91-692

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TONYA RHODES, Personal Representative of the Estate of JAMES EDWARD WEST, Deceased,
Petitioner,

v.

CRAIG MCDANNEL, H. CAL ROSEMA, in his official capacity as Van Buren County Sheriff, VAN BUREN COUNTY SHERIFF'S DEPARTMENT and VAN BUREN COUNTY,
jointly and severally,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS SUBMITTED FOR REVIEW

In a case in which petitioner's complaint which alleges violations of the Fourth Amendment was dismissed under Federal Rule of Civil Procedure 56:

I. Should Petitioner Have Been Allowed to Complete Discovery Prior to Entry of an Order Granting Summary Judgment?

II. Did Respondents' Warrantless Entry into Petitioner's Home, without Consent and without Exigent Circumstances Present, Violate Petitioner's Fourth Amendment Rights to Be Free From Unreasonable Search and Seizure?

III. Did Respondents' violate Petitioner's Fourth Amendment rights after illegally entering Petitioner's home unreasonably creating circumstances which forced a confrontation with Decedent in his own home?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Tonya Rhodes, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion and order affirming the United States District Court and denying rehearing of the United States Court of Appeals for the Sixth Circuit. The opinion and judgment of the Court of Appeals were entered in this case on June 10, 1991, and the petition for rehearing was denied on July 30, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered June 10, 1991 is reprinted in the Appendix herein at 7a. The Order of the Court of

Appeals for the Sixth Circuit entered July 30, 1991 denying Petitioner's motion for rehearing is reprinted in the Appendix herein at 15a. The Order granting Respondents/ Motion for Publication entered September 10, 1991 is reprinted in the Appendix herein at 7a. The memorandum and order of the United States District Court for the Western District of Michigan entered December 13, 1989 is reprinted in the Appendix herein at 35a.

JURISDICTION

This is a civil action arising under the United States Constitution and, therefore, jurisdiction for the filing of this action was invoked under 28 USC § 1331, and § 1291.The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

PROCEDURAL HISTORY

Petitioner Tonya Rhodes is the daughter of the deceased James West and serves as personal representative for the estate. The estate of James West,

through personal representative Tonya Rhodes, brought this action on the 9th day of August, 1989, under the Fourth and Fourteenth Amendments of the United States Constitution and 42 USC § 1983 and § 1988 to recover damages resulting from the illegal entry into the deceased's home and the shooting death of the decedent by Van Buren County Deputy Sheriff Craig McDannel, after the illegal entry.

On December 13, 1989, the district court granted Respondents' motion for summary judgment. See Appendix at 35a infra. Discovery was not complete. Petitioner was expeditiously pursuing discovery and informed the district court that further discovery would be required. On Petitioner's appeal, the Sixth Circuit Court of Appeals, on June 10, 1991, affirmed the judgment from which appeal was taken. (See Appendix at 8a infra) A petition for rehearing was timely sought and denied by order of the court, entered July 30, 1991. (See Appendix at 15a, infra) On September 10, 1991, the Court granted Respondents' Motion for Publication.

STATEMENT OF FACTS

On the evening of March 7, 1989, the deceased, James West, (hereinafter West) was in his home at 311 East Street in Hartford, Michigan. West resided in this dwelling with his elderly mother. At approximately 11:00 p.m. on March 7, 1989, deputies from the Van Buren County Sheriff's Department responded to a dispatch directing them to 311 East Street in Hartford. A call had been lodged with the Hartford Police Department alleging that a woman was being chased with a knife. A man actually made a call to the police.

The Court of Appeals accepted Respondents' characterizations that Shari Heffington, the deceased's girlfriend, called the police, reporting that she was being chased around the home with a machete. This is not supported by any fact in the record.

When the officers arrived at the West home, they did not see anything occurring. Shari Heffington came to the door alone, and she was not being pursued nor in any apparent danger. At that point, the normal procedure would have been to take a statement. Ignoring the usual procedures, Deputies Shaw and McDannel "accompanied Shari Heffington through the porch area and into the front room of the residence".

McDannel, Shaw and Shari entered the first living room of the home and still had not seen West. West's mother was asleep in a side bedroom, unknown to the deputies. McDannel admits that he never paid any attention to the surroundings or layout of the home. After a time, West entered the second room of the living room area from a back bedroom. West was carrying a machete as he came out of the back bedroom. According to the deputies, West was told to drop the machete, but failed to do so. He never spoke. Deputy McDannel shot and killed James West.

It was not until after the shot was fired that Shari Heffington was removed from the home and placed in a police car. Before he was shot, West had to step around a couch before entering the second living room. Deputy McDannel testified that the blade was pointing at the floor while held in Mr. West's right hand. The deceased was left handed and suffered from disabling arthritis in his hands and shoulders.

Deputy McDannel testified that, prior to entering the scene, he had not formulated a plan or approach

as to how the situation would be handled, although the deputies claim they knew West was in the house. The deputies were allegedly responding to the call as a domestic dispute with a weapon involved.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Sixth Circuit on September 10, 1991 granted Respondents' Motion for Publication of the opinion in this matter, thus, assuring that it will set the tone for police conduct on the important constitutional principles affecting home searches.

Respondents cannot overcome the presumption against warrantless entries into the home based on the facts in this case. Respondents' actions caused a confrontation with West resulting in his death. No basis exists justifying Respondents' warrantless entry into the West home. Likewise, no basis exists justifying West's death after their illegal entry.

The Sixth Circuit Court of Appeals has decided an important question of federal law which departs from the "presumptively unreasonable" standard of searches of a private dwelling. The line drawn in Fourth Amendment cases at the footsteps of the American home should be clear and bright. Warrantless entry into the home should not be justified on the basis of afterthought. This entry, as in *Payton v. New York*, 445 U.S. 573 (1980) is "presumptively unreasonable". This Court has stated: "It is a 'basic principle of Fourth Amendment Law' that searches and seizures inside a home without a warrant are presumptively unreasonable" 445 U.S. 573 at 585.

This standard has been disregarded by the Sixth Circuit in this instance.

The Respondents offer two justifications for their entry into the West home: (1) consent and (2) exigent circumstances. The Sixth Circuit departed from the current case law in its application of these doctrines in this case. Even the dissenters in *Payton* recognized that, at a minimum, four restrictions are required to guard against invasions of personal privacy of a person's dwelling:

> "These four restrictions on home arrests—felony, knock, and announce, daytime and stringent probable cause—constitute power and complimentary protections for the privacy interests associated with the home." *Payton*, 445 U.S. 16 616-617 (White J., dissenting)

None of these limitations have been satisfied in this case. The basis for arriving at the home was apparently an anonymous call by a male individual. This did not form any basis in the mind of the police officers to justify the kind of emergency which is described by the Court of Appeals. *In fact, the police officers all acknowledged that no emergency existed.* This fact was completely ignored by the Court of Appeals. In its decision, the Sixth Circuit Court of Appeals has significantly broadened the principals which would justify warrantless entries into private dwellings contrary to current teachings of this Court.

II. This Court Should Rule That Summary Judgment Is Inappropriate When Discovery Has Not Been Completed

In a motion for summary judgment, the non-moving party is entitled to have the Court view the evidence

and the inferences therefrom in a light most favorable to him. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed. 2d 202, 216 (1986) ("[T]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.")

In this case, the total circumstances surrounding the unlawful entry and shooting must be considered; not just the self serving testimony of the officers, but the contradictions as well. In view of the evidence presented, a reasonable fact finder could conclude that Respondents violated the constitutional protections of James West, the deceased.

This can be viewed in two parts, the illegal entry into the home and the excessive force which occurred as a result of the illegal entry. The facts relating to both are in dispute and should have been submitted to the jury. The evidence Petitioner presented is entitled to be believed, and all justifiable inferences are to be drawn in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed. 2d.202, 216 (1986).

Moreover, the district court granted summary judgment before discovery was complete, despite Petitioner's requests to be allowed to complete discovery pursuant to FRCP 56(F). The court of appeals affirmed the district court's dismissal. This holding directly conflicts with the other circuits' conclusions on this issue. See Advisory Committee for the 1963 Amendments to Fed.R.Civ.P. 56(f); *See also, National Life Insurance Co. v. Soloman*, 529 F.2d 59 (2nd Cir. 1975); *First Chicago International v. Untied Exchange Co.*, 836 F.2d 1375 (App. DC 1988) (determination of summary judgment issues is appropriate only after

Plaintiff has had full opportunity to conduct discovery).

Petitioner was diligently pursuing discovery when the court set this matter for hearing. Petitioner had hired two national experts. Less than three months did not provide adequate time for Petitioner to locate Shari Heffington nor to properly obtain and examine all of the physical evidence which was in Respondents' possession. Petitioner was still pursuing depositions of investigating officers and acquisition of the physical evidence when summary judgment entered. Petitioner has since located Ms. Heffington and believes she will testify (1) she did not invite the deputies into the home; and (2) deadly force was not necessary.

In addition, summary judgment is inappropriate where an affidavit of an expert opinion raises or supports material questions of fact. Where, as here, Petitioner's experts were shown to be qualified and their rationales reasonable, the rules do not require prior disclosure of underlying facts. Petitioner's experts' affidavits comport with Rules 702-705 justifying a denial of summary judgment. *See Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980).

It is imperative to remember that these experts were not allowed sufficient time within which to review all of the evidence. Additional affidavits from Petitioner's experts, which would have been submitted had discovery progressed and time allowed, would have demonstrated significant factual questions to the lower court. Had Petitioner been allowed to pursue discovery, expert criminalist Lucien Haag would have testified that the distance between the victim and the deputies was at least 8–9 feet, not the 4–6 feet as claimed by McDannel. His examinations of the phys-

ical evidence reveal that the trajectory of the shot and the location of Deputy McDannel is contrary to Respondents' testimony of the officers, raising a legitimate inference that deadly force was not required and possible fabrication on the part of the Defendants. Dr. George Kirkham, a nationally recognized expert in police procedure, would have testified that the procedures utilized by Respondents in this instance were contrary to proper police procedures, were grossly negligent and were directly linked to the death of Petitioner's decedent. The lower court then drew unwarranted conclusions of fact from Respondents' version of the scenario while disregarding the testimony of Petitioner's experts.

III. The Sixth Circuit Was Wrong to Hold the Respondents' Warrantless Entry into the Decedent's Home without Proper Authorization or Justification Did Not Violate Petitioner's Fourth Amendment Rights

The basic history attendant to the sanctity and privacy of the home is preserved in the Constitution and reemphasized in the cases where the Court has interpreted that issue under the Fourth Amendment. The Sixth Circuit has created a significant and dangerous departure from clearly established law in upholding the warrantless entry into Petitioner's home under these facts. The Court noted in *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980) its approval of the Second Circuit position stated in *United States v. Reid*, 572 F.2d 412, 423 (1978), as follows:

> "To be arrested in the home involves not only the invasion attendant to all arrests but also the invasion of the sanctity of the home. This is simply too substantial an invasion to

> allow without warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present."

The attempted justification for entry into the private home in this case is a thought which occurred "after the fact". Mr. West was shot and killed in his own living room. No warrant, no probable cause and no arrest can be offered to explain the presence of the officers in his home. He was presumed innocent of any crime. No one was in immediate danger. No warning of entry was given to Mr. West. An intrusion into the home to act on an anonymous phone call is just the type of warrantless entry that the Fourth Amendment was designed to guard against. To surrender these protections because the entry seems expedient is to sacrifice constitutional principles to the impulse of the moment. The sanctity and privacy of the home is at stake in this ruling. In his majority opinion in *Payton*, Justice Stevens states that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585. Justice White in his dissent did not dispute that " . . . the home is generally a very private area or that the common law displayed a special 'reverence' . . . for the individual's right of privacy in his house. *Miller v. United States*, supra, at 313"; *Payton*, 445 U.S. at 615. This promise of security from invasion by the state contained in the Fourth Amendment is a precious principle. It should not be compromised in order to justify an entry which never should have occurred in the first place.

A. This Court Should Rule that Its Decisions under the Fourth Amendment Protect Petitioner from Unreasonable Search and Seizure When the Police Entered His Home without Proper Consent

The deceased had committed no crime and had every legal right to be secure in his own home. It is undisputed that Respondents did not have a warrant to enter Petitioner's home. No constitutionally sound basis for a warrantless entry in the West home has ever been shown.

Shari Heffington did not have any authority to "invite" the police into the West home. Petitioner does not concede Heffington "invited" the deputies into the West home. Petitioner believes that, had discovery not been cut short by the lower court's ruling, Shari would have testified she did not invite the deputies into the dwelling. The court of appeals improperly concluded that Shari had "from that address previously contacted police and admitted to residing there on occasion." (Opinion at p. 4) The deputies had absolutely no knowledge of this alleged fact before they entered the home. This conclusion is completely unsubstantiated and unjustifiable. The "non-existence" of this knowledge does not confer a "mutual use" status upon Shari. More importantly, the officers were completely unaware of any previous domestic calls to that residence. The court of appeals imputes this knowledge to the deputies. The deputies never asked Shari if she lived there. The police only knew that a man had called in the report. Their actions, based solely upon the knowledge that an unknown man had called, are a complete affront to the security provided by the Fourth Amendment. The court of appeals draws inferences which are completely unsupported by facts. The Constitution does not envision

such a foundation for a warrantless entry into a private home.

The court of appeals' holding departs from the Supreme Court's holding in *United States v. Matlock*, 415 U.S. 164, 171 (1974), which stated, "consent can be obtained from a third party with 'common authority' over the property, but that a mere property interest' is insufficient". *Fludd v. United States Secret Service*, 771 F.2d 549 (1985). As a prerequisite to finding common authority, (for which consent might be valid) the courts have held that there must be a "mutual use of the property by persons generally having joint access or control for most purposes". *Fludd v United States Secret Service*, 771 F.2d 549 (1985), citing *Matlock*. There has been absolutely no demonstration of mutual use or control by Heffington in the West home. The conclusions drawn by the district court and the court of appeals are all based upon after-the-fact claims, which should not be considered in evaluating Shari's alleged consent or ability to consent. The lower court's conclusions constitute a serious departure from well established law for consent as a justification for a warrantless entry into a private dwelling.

B. This Court Should Rule that Respondents' Warrantless Entry into the Decedent's Home Is Not Justified by the Exigent Circumstances Doctrine

A few narrow exceptions exist justifying a warrantless entry into a private dwelling. The burden of establishing exigent circumstances justifying a warrantless in-home entry is on the State. In limited circumstances, emergency situations warrant entry into a dwelling. In this case, the facts simply do not support an exception based on the exigent circum-

stances doctrine and the State has not met its burden. The appellate court's conclusions directly contradict well established law.

This Court clearly recognized in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *Payton* that the "Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be crossed." *Payton*, 445 U.S. at 590.

The Court has not and should not back away from the presumption of unreasonableness that attaches to all warrantless home entries. In *Welsh v. Wisconsin*, 466 U.S. 740, (1984), the Court reaffirmed the long-standing requirement that exigent circumstances must be established which overcome the presumption of unreasonableness. The Court was clear in its holding that no exigency is created simply because there is probable cause to believe a crime has been committed. In this case, probable cause has never been established, and certainly, the deputies had no reliable information that any crime had been committed. *Welsh*, 466 U.S. at 751.

It is clear that the Court reaffirmed prior decisions of the Court which have emphasized that only a few carefully delineated exceptions to the warrant requirement exist. *Welsh*, 466 U.S. at 749.

The lower court apparently accepted Respondents' arguments that exigent circumstances existed on the basis that they were responding to an emergency because "the telephone call indicated that Shari was being pursued by a man with a knife". Respondents had no knowledge of who made the call, and their illegal entry should not be justified predicated on an

anonymous phone call. In accepting Respondents' version of the facts, the lower court stated, "[f]urthermore, upon arrival the officers verified that an emergency existed which posed a real danger to the police and public." This interpretation of the facts is accepted unquestionably in spite of clear evidence to the contrary. The officers denied any emergency existed.

The facts, as stated by the deputies, refute any possible contention that exigent circumstances existed to justify a warrantless entry into the West home. Respondents testified that, upon arrival at the scene, *nothing* was occurring! It is undisputed that Shari was unharmed when she answered their knock at the porch door and came outside. She was not in any immediate danger. The inference to be drawn from the fact that Mrs. West was asleep during the time this occurred further supports the deputies' admissions that no emergency existed.

Respondents' attempt to apply the exigent circumstances doctrine *after* the deputies were already in the home by stating that "the decedent was obviously committing a crime in the presence of the officers, felonious assault." Petitioner disputes this conjecture but, more importantly, the proper time frame for an analysis of exigent circumstances is *prior* to the illegal entry into Petitioner's home. Events which did or did not arise after the initial illegal entry do not relate back in the consideration of the exigent circumstances doctrine. The initial entry was unreasonable, and it was improper. The decision to make that entry was at least negligent under the facts of this case. Even though Petitioner contends that it was grossly negligent, simple negligence is enough to make

the initial entry unreasonable and a violation of the Fourth Amendment protections.

The emergency exception to the Fourth Amendment's warrant requirement dictates that the entering officer subjectively believe that an emergency exists; the officer's motivation is critical to the court's determination of the validity of the defense. In *Frazier v. Cast*, 771 F.2d 259 (1985), the Court issued sanctions against the defense counsel for asserting the defense of exigent circumstances without a factual basis for doing so. The Court concluded that no emergency existed justifying a warrantless entry into the decedent's home. In *Frazier*, the Court found that the police attempted to force the decedent out of the home with tear gas and then entered the home to find the decedent unconscious and in need of aid, but not in a life threatening situation. The Frazier Court held that the police officer's actions were motivated by impatience, not concern to save the man.

The deputies in this case had the alleged "victim" outside the home, unharmed and not in a presently threatening situation. No "fear of harm to the police or the public" was present when the deputies arrived at the West home. The testimony of Respondents, themselves, directly contradicts the lower court's conclusions that an emergency existed permitting a warrantless entry. No "real danger that evidence or a suspect might be lost" existed when the deputies entered the West home without a warrant. Respondents clearly violated the sanctity of this private dwelling when they entered it without a warrant and without the proper authority.

The lower court's conclusions are overreaching and allow an impermissible exception to Fourth Amend-

ment protections. Adherence to restrictions upon unannounced entries are taught by this Court. If the security and privacy of the home is to have any meaning these teachings must be followed. If the Fourth Amendment is to provide protection this Court must ensure that invasions of the home, particularly in the night-time, follow the rules.

IV. This Court Should Address the Issue of Whether Respondents' Violated Petitioner's Fourth Amendment Rights after Illegally Entering Petitioner's Home and Unreasonably Creating Circumstances Which Forced a Confrontation with Decedent in His Own Home Resulting in His Death.

The court also summarily dismissed Petitioner's claims of excessive force based solely on the events occurring *after* the police illegally entered the home. The lower court failed to consider the illegal entry. Moreover, it failed to consider the impact of the proposed testimony of Petitioner's experts and the premature cut-off of discovery. By allowing the ends to justify the means the Fourth Amendment protections have been trivialized by the court.

The deputies should never have been in the home in the first place, and their explanation for how they entered should not be believed under the totality of the circumstances. This conclusion is supported by the expert testimony of Dr. George Kirkham.

Deputy McDannel is not entitled to the self protection or protection of others defense where he is at fault for creating the need for self defense. Deputy McDannel's action of alleged self defense does not affect his culpability with regard to his prior act creating the confrontation. by violating the Fourth Amendment, Deputy Shaw testified that the dis-

patcher informed the deputies that a man called about someone being chased with a knife. Deputy McDannel testified that, based on the dispatch, he had knowledge a weapon was involved. He also testified that, when she met the deputies at the door, Shari told them West was still in the house. Despite this knowledge, the deputies took Shari back into the house. Deputy McDannel was not under any "pressure" when he committed the first act of entering the decedent's home without first removing the citizen. This unreasonable act was not only a violation of decedent's Fourth Amendment Rights, it was a direct causal link to all subsequent events.

The fact that Mr. West is dead and unable to give testimony does not mean that the court is free to believe the self serving statements of the officers, particularly when their statements do not conform to the physical evidence and are contradicted by Petitioner's experts. Discovery was not concluded, and Petitioner was not given the opportunity to examine all the physical evidence. A careful review of the photographs and the police reports raises serious credibility and factual issues.

In every photograph taken by the Van Buren County Sheriff's Department, the door through which the deceased allegedly came is closed. This means an individual had to go to the room and close the door, properly latching it so that it would not swing open as it normally does. With the door closed, the entry point of the bullet into the wall is visible. When the door is open, as Respondent contends it was during the shooting, the bullet hole is covered by approximately 6 inches of the door. This evidence emphatically contradicts the testimony of Respondents, raising

credibility and factual issues concerning the amount of time elapsing before Mr. West was shot. It contradicts the officers claim that they had no time to retreat.

It is this illegal, 11:00 p.m., unannounced entry which caused the circumstances resulting in the death of Mr. West. This is much more than an "incremental" intrusion made to effect an arrest. It is a highly intrusive invasion fitting none of the four restrictions set out by Justice White in *Payton* for "home arrests". It is not even made to effect an arrest. It is an entry for which no plausible explanation has been made to meet the state's burden for justifying a warrantless entry. It was, as testified to by Dr. George Kirkham, reckless and unreasonable.

CONCLUSION

Significant departures from clearly established law served to deprive Petitioner of the opportunity to complete discovery prior to summary judgment. The departures adopted by the Sixth Circuit also broadened the exceptions to the applicability allowing consent and exigent circumstances to justify a warrantless entry into a private dwelling. The application of these broadened exceptions contradicts the presumptive unreasonable standard of a warrantless entry into a person's home.

Justice Stevens' conclusions in denouncing improper warrantless entries into private dwellings in *Payton* also holds true under the facts of this case: "... neither history nor this nations's experience requires us to disregard the overriding respect for the sanctity of the home that has been imbedded in our traditions since the origins of the Republic." *Payton*, 445 U.S.

at 601. Upholding the officer's entry into the West home directly controverts the plain meaning of the Fourth Amendment and the historical preservation of the sanctity of the home by this Court.

Reaffirmation of *Payton* and its progeny, as well as *Matlock* and its progeny, is critical when the circuits seek to substantially undermine and alter the protections guaranteed by the United States Constitution and developed under the case law of this Court. Petitioner respectfully requests that this Court grant her petition for certiorari for full consideration of the issues raised herein.

Respectfully Submitted,

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APPENDIX

APPENDIX A

Nos. 90-1160/1161/1162

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TONYA RHODES,
Plaintiff-Appellant,

v.

CRAIG MCDANNEL, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed June 10, 1991

Before: RYAN and SUHRHEINRICH, Circuit Judges; and SILER, Chief District Judge.*

PER CURIAM. The appellant, Tonya Rhodes, representative of the estate of James E. West (hereinafter "plaintiff"), in this 42 U.S.C. § 1983 action appeals a summary judgment entered by the district court in favor of the appellees Deputy Sheriff Craig McDannel, Sheriff H. Cal Rosema, and the Van Buren County Sheriff's Department.

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*The Honorable Eugene E. Siler, Jr., Chief United States District Judge for the Eastern District of Kentucky and United States District Judge for the Western District of Kentucky, sitting by designation.

This case arises out of a shooting incident that occurred at the home of the late James West in Hartford, Michigan. On March 7, 1989, the Hartford Police Department was telephoned by Shari Heffington (Shari)[1] who stated that West was chasing her around the home with a machete. Deputies McDannel and Shaw went to the door of West's home and were met by Shari. Deputies Lux and Craft remained outside the home to secure the perimeter. Shari informed the officers that West was in the home and threatening her with a knife. Shari escorted the officers into the living room when West entered the room and advanced with a machete toward Shari and the two officers. Several times the officers ordered West to drop the knife, but West failed to heed the warnings. When he advanced within a distance of four to six feet with the machete raised, McDannel fired his weapon and killed West.

Plaintiff raised two issues before the district court on the merits of the case: gross negligence by McDannel and the use of unreasonable deadly force. The court granted summary judgment for the defendants. On the first issue (gross negligence), relying on *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987), it ruled that the undisputed facts negate any gross negligence on the part of the deputies. On the second issue (unreasonable deadly force), it held as a matter of law that the deadly force used was not unreasonable, in light of the undisputed facts that West advanced toward the officers with a machete that had a 24-inch blade, that he raised it after ignoring a warning to drop it, and that he got within four to six feet of the officers before he was shot. In addition, the plaintiff moved for a recusal of the judge. The trial court denied the motion for failure to assert facts sufficient for recusal under 28 U.S.C. §§ 144 and 455(a). For the following reasons, we affirm.

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[1]There was some evidence in the record that the caller may have been Junior Heffington, Shari's father.

I.

The first issue is whether the plaintiff was given sufficient opportunity for discovery prior to the entry of summary judgment. The district court has broad discretion in regulating discovery, and its ruling will not be overturned unless there is a clear abuse of discretion. *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198 (6th Cir. 1986); *see also Little v. City of Seattle*, 863 F.2d 681 (9th Cir. 1988).

As the court issued its final orders within three months of filing of the complaint, the plaintiff argues that she did not have the benefit of the following expert evaluations: (1) an expert opinion stating that the distance between the deputies and the deceased at the time of the shooting was at least eight to nine feet; (2) an expert opinion that proper police procedure was to secure the premises; (3) an opportunity to examine the gun; and (4) an opportunity to investigate the trajectory of the shot. Assuming that the distance was eight to nine feet, an immediate threat to safety remains in the living room that measures eight by ten feet. The expert opinion on police procedure is not conclusive as to whether the officers' actions are "objectively reasonable" anyway. *See Graham v. Connor*, 490 U.S. 386 (1989). Finally, an examination of the trajectory of the shot would appear to be evidence only to contradict the officers' testimony concerning the direction of the shot.

II.

In order to sustain a section 1983 claim, one must show that: (1) the conduct was under color of state law; (2) the conduct deprived the plaintiff of constitutional rights; and (3) the deprivation occurred without due process of law. *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987)(en banc). The plaintiff claims that her fourth amendment rights were violated when the officers entered the home without a warrant. However, there were consent and exigent circumstances, each of which

allows a warrantless entry of the dwelling.

The plaintiff asserts that the officers failed to prove that they obtained consent to enter from one who had the authority to consent. She argues that the consent exception to the warrant requirement does not apply, because Shari was a third party who had no interest in the West home and was not a co-habitant of the premises. *See Moffett v. Wainwright*, 512 F.2d 496 (5th Cir. 1975) (defendant's girlfriends did not have sufficient rights to the premises to consent to a search).

However, the *Moffett* case is distinguishable. In the present case, there was an invitation by Shari to enter the premises. She had the apparent authority to consent to the entry, as she had from that address previously contacted police and admitted to residing there on occasion. Third party consent "does not rest upon the law of property ... but rests rather on mutual use of the property by persons generally having joint access or control...." *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). Shari had mutual use of the premises and referred to the residence as her home address.

The plaintiff also argues that the exigent circumstances exception does not apply because: (1) the officers observed that Shari was unharmed; (2) there was no immediate danger observed upon arrival; and (3) there would have been no danger if the officers had removed Shari from the alleged area of danger.

However, the officers were entitled to search a private dwelling without a warrant, if they were responding to an emergency. *United States v. Dart*, 747 F.2d 263, 267 (4th Cir. 1984). The telephone call indicated that Shari was being pursued by a man with a knife. Furthermore, upon arrival the officers verified that an emergency existed which posed a real danger to the police and public. Accordingly, even if Shari's consent was invalid, exigent circumstances existed which permitted a warrantless entry.

III.

The plaintiff argues that the officers used excessive force and created the need for such force. A section 1983 claim exists if an officer acting under the color of state law "intentionally does something unreasonable with disregard to a known risk or a high probability that harm will follow." *Nishiyama v. Dickson County, Tenn.*, *supra*. Nonetheless, deadly force may be used "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than the 20/20 vision of hindsight.... [and] the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham, 490 U.S. at 396-97. As West advanced upon the officers and Shari with a raised machete, despite several warnings to halt, McDannel was justified in using deadly force. Furthermore, the fact that the officers entered the home with Shari in order to apprehend West did not amount to gross negligence under *Nishiyama*.

IV.

The plaintiff argues that gross errors in police procedure occurred and that the Sheriff's Department failed to properly train and supervise its deputies. However, the Sheriff's Department is not a legal entity subject to suit, *Kurz v. Michigan*, 548 F.2d 172, 174 (6th Cir.), *cert. denied*, 434 U.S. 972 (1977), nor is the sheriff responsible for the misconduct of the deputies. Mich.Comp.Laws § 51.70 (1990). As to the officers' individual capacities, they are each entitled to qualified

immunity. Qualified immunity exists for governmental officials who perform discretionary functions unless their conduct violates clearly established constitutional rights of another. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). When Wes: approached the officers with a machete, McDannel justifiably acted in defense of himself and others.

V.

The plaintiff argues that the district judge showed hostility and lack of impartiality toward plaintiff's counsel. It is alleged that the judge admonished counsel for filing cases without knowing the law and stated " Mr. Yingst, put your pencil down, I am talking to you! That is very disrespectful!" The plaintiff cites 28 U.S.C. §§ 144 and 455(a) which state that a judge may be disqualified or recuse himself from a case where personal bias or prejudice exists against a party or for an opponent.

The plaintiff has the burden to convince a reasonable man that bias exists. *United States v. Story*, 716 F.2d 1088 (6th Cir. 1983). The plaintiff has failed to establish objective evidence of "personal" bias. *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956). The judge's admonishment of counsel exhibited frustration, but not bias or prejudice toward the plaintiff's case.

Finding no error in the proceedings below, the district court judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 90-1160, 90-1161

TONYA RHODES, Personal Representative of the Estate of JAMES EDWARD WEST, Deceased
Plaintiff-Appellant Cross-Appellee

v.

CRAIG MCDANNEL; H. CAL ROSEMA, in his official capacity as Van Buren County Sheriff; VAN BUREN COUNTY SHERIFF'S DEPARTMENT; VAN BUREN COUNTY
Defendants-Appellees Cross-Appellants

FILED
SEP 10, 1991
LEONARD GREEN, Clerk

ORDER

Upon consideration of the appellees' motion to publish the court's June 10, 1991 decision in these cases,

It is ORDERED that the motion be, and it hereby is, GRANTED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

APPENDIX C

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90-1160/61

TONYA RHODES,
Plaintiff-Appellant.

v.

CRAIG MCDANNEL, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

FILED
JUN 10 1991
LEONARD GREEN, Clerk

Before: RYAN and SUHRHEINRICH, Circuit Judges; and SILER, Chief District Judge.*

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* The Honorable Eugene E. Silr, Jr., Chief United States District Judge for the Eastern District of Kentucky and United States District Judge for the Western District of Kentucky, sitting by designation.

PER CURIAM. The appellant Tonya Rhodes, representative of the estate of James E. West (hereinafter "plaintiff"), in this 42 U.S.C. § 1983 action appeals a summary judgment entered by the district court in favor of the appellees Deputy Sheriff Craig McDannel, Sheriff H. Cal Rosema, and the Van Buren County Sheriff's Department.

This case arises out of a shooting incident that occurred at the home of the late James West in Hartford, Michigan. On March 7, 1989, the Hartford Police Department was telephoned by Shari Heffington (Shari)[1] who stated that West was chasing her around the home with a machete. Deputies McDannel and Shaw went to the door of West's home and were met by Shari. Deputies Lux and Craft remained outside the home to secure the perimeter. Shari informed the officers that West was in the home and threatening her with a knife. Shari escorted the officers into the living room when West entered the room and advanced with a machete toward Shari and the two officers. Several times the officers ordered West to drop the knife, but West failed to heed the warnings. When he advanced within a distance of four to six feet with the machete raised, McDannel fired his weapon and killed West.

Plaintiff raised two issues before the district court on the merits of the case: gross negligence by McDannel and the use of unreasonable deadly force. The court granted summary judgment for the defendants. On the first issue (gross negligence), relying on *Jones v. Sherrill*, 827 F.2d 1102. 1106 (6th Cir. 1987), it ruled that the undisputed facts negate any gross negligence on the part of the deputies. On the second issue (unreasonable deadly force), it held as a matter of law that the deadly force used was not unreasonable, in light of the undisputed facts that

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[1] There was some evidence in the record that the caller may have been Junior Heffington, Shari's father.

West advanced toward the officers with a machete that had a 24-inch blade, that he raised it after ignoring a warning to drop it, and that he got within four to six feet of the officers before he was shot. In addition, the plaintiff moved for a recusal of the judge. The trial court denied the motion for failure to assert facts sufficient for recusal under 23 U.S.C. §§ 144 and 455(a). For the following reasons, we affirm.

I.

The first issue is whether the plaintiff was given sufficient opportunity for discovery prior to the entry of summary judgment. The district court has broad discretion in regulating discovery, and its ruling will not be overturned unless there is a clear abuse of discretion. *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198 (6th Cir. 1986); *see also Little v. City of Seattle*, 863 F.2d 681 (9th Cir. 1988).

As the court issued its final orders within three months of filing of the complaint, the plaintiff argues that she did not have the benefit of the following expert evaluations: (1) an expert opinion stating that the distance between the deputies and the deceased at the time of the shooting was at least eight to nine feet; (2) an expert opinion that proper police procedure was to secure the premises; (3) an opportunity to examine the gun; and (4) an opportunity to investigate the trajectory of the shot. Assuming that the distance was eight to nine feet, an immediate threat to safety remains in the living room that measures eight by ten feet. The expert opinion on police procedure is not conclusive as to whether the officers' actions are "objectively reasonable" anyway. *See Graham v. Connor*, 490 U.S. 386 (1989). Finally, an examination of the trajectory of the shot would appear to be evidence only to contradict the officers' testimony concerning the direction of the shot.

II.

In order to sustain a section 1983 claim, one must show that: (1) the conduct was under color of state law; (2) the conduct deprived the plaintiff of constitutional rights; and (3) the deprivation occurred without due process of law. *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987)(en banc). The plaintiff claims that his fourth amendment rights were violated when the officers entered the home without a warrant. However, there were consent and exigent circumstances, each of which allows a warrantless entry of the dwelling.

The plaintiff asserts that the officers failed to prove that they obtained consent to enter from one who had the authority to consent. She argues that the consent exception to the warrant requirement does not apply, because Shari was a third party who had no interest in the West home and was not a co-habitant of the premises. *See Moffett v. Wainwright*, 512 F.2d 496 (5th Cir. 1975) (defendant's girl friends did not have sufficient rights to the premises to consent to a search).

However, the *Moffett* case is distinguishable. In the present case, there was an invitation by Shari to enter the premises. She had the apparent authority to consent to the entry, as she had from that address previously contacted police and admitted to residing there on occasion. Third party consent "does not rest upon the law of property . . .but rests rather on mutual use of the property by persons generally having joint access or control . . . ." *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). Shari had mutual use of the premises and referred to the residence as her home address.

The plaintiff also argues that the exigent circumstances exception does not apply because: (1) the officers observed that Shari was unharmed; (2) there was no immediate danger observed upon arrival; and (3) there would have been

no danger if the officers had removed Shari from the alleged area of danger.

However, the officers were entitled to search a private dwelling without a warrant, if they were responding to an emergency, *United States v. Dart*, 747 F.2d 263, 267 (4th Cir. 1984). The telephone call indicated that Shari was being pursued by a man with a knife. Furthermore, upon arrival the officers verified that an emergency existed which posed a real danger to the police and public. Accordingly, even if Shari's consent was invalid, exigent circumstances existed which permitted a warrantless entry.

III.

The plaintiff argues that the officers used excessive force and created the need for such force. A section 1983 claim exists if an officer acting under the color of state law "intentionally does something unreasonable with disregard to a known risk or a high probability that harm will follow." *Nishiyama v. Dickson County, Tenn.*,*supra*. Nonetheless, deadly force may be used "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than 20/20 vision of hindsight .... [and] the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham, 490 U.S. at 396-97. As West advanced upon the officers and Shari with a raised machete, despite several warnings to halt, McDannel was justified in using deadly force. Furthermore, the fact that the officers entered the

home with Shari in order to apprehend West did not amount to gross negligence under *Nishiyama*.

IV.

The plaintiff argues that gross errors in police procedure occurred and that the Sheriff's Department failed to properly train and supervise its deputies. However, the Sheriff's Department is not a legal entity subject to suit, *Kurz v. State of Michigan*, 548 F.2d 172, 174 (6th Cir. 1977). *cert. denied*, 434 U.S.972 (1977), nor is the sheriff responsible for the misconduct of the deputies. Mich. Comp. Laws § 51.70 (1990). As to the officers' individual capacities, they are each entitled to qualified immunity. Qualified immunity exists for governmental officials who perform discretionary functions unless their conduct violates clearly established constitutional rights of another. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). When West approached the officers with a machete, McDannel justifiably acted in defense of himself and others.

V.

The plaintiff argues that the district judge showed hostility and lack of impartiality toward plaintiff's counsel. It is alleged that the judge admonished counsel for filing cases without knowing the law and stated "Mr. Yingst, put your pencil down. I am talking to you! That is very disrespectful!" The plaintiff cites 28 U.S.C. §§ 144 and 455(a) which state that a judge may be disqualified or recuse himself from a case where personal bias or prejudice exists against a party of for an opponent.

The plaintiff has the burden to convince a reasonable man that bias exists. *United States v. Story*, 716 F.2d 1088 (6th Cir. 1983). The plaintiff has failed to establish objective evidence of "personal bias. *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956).

The judge's admonishment of counsel exhibited frustration, but not bias or prejudice toward the plaintiff's case.

Finding no error in the proceedings below, the district court judgment is AFFIRMED.

ISSUED AS MANDATE: August 7, 1991
COSTS: NONE

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/ Sharon R. Tallaugo
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 90-1160/61

TONYA RHODES, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES EDWARD WEST, DECEASED,
Plaintiff/Appellant/Cross- Appellee,
v.

CRAIG McDANNEL; H. CAL ROSEMA, IN HIS OFFICIAL CAPACITY AS VAN BUREN COUNTY SHERIFF; VAN BUREN COUNTY SHERIFF'S DEPARTMENT; VAN BUREN COUNTY,
Defendants-Appellees/Cross-Appellants

FILED
JUL 30 1991
LEONARD GREEN, Clerk

ORDER

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and SILER*, Chief Judge, United States District Court.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having

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* Hon. Eugene E. Siler, Jr. sitting by designation from the Eastern District of Kentucky.

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. G-89-50761-CA

TONYA RHODES, Personal Representative of the Estate of James Edward West, Deceased

Plaintiff,

vs.

CRAIG McDANNEL, H. CAL ROSEMA, in his official capacity as Van Buren County Sheriff, VAN BUREN COUNTY SHERIFF'S DEPARTMENT and VAN BUREN COUNTY, jointly and severally,

Defendants.

Motion for Summary Judgment

Before

THE HONORABLE ROBERT HOLMES BELL
U.S. District Judge
November 21, 1989

PRESENT:

ROBERT A. YINGST (P22624)
9047-4 U.S. 31 North, P.O. Box 268
Berrien Springs, MI 49103
Attorney for Plaintiff

RICHARD H. WINSLOW (P22449)
401 Comerica Building
Battle Creek, MI 49017
Attorney for Defendants

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

PROCEEDINGS

THE COURT: The first matter of the morning on the record is the matter of Rhodes versus McDannel, et al. This is our file 89-50761-CA by number. This is the Defendants' motion for summary judgment or dismissal, and it's also a time set for a status conference. This Court is adjourning the status conference portion of the hearing today for potentially a later day. Mr. Yingst represents the Plaintiff; Mr. Winslow, I believe, represents the Defendant.

Mr. Winslow, you may be heard on your motion.

MR. WINSLOW: Thank you. Your Honor. I know the Court has had the opportunity to review our motion, the accompanying brief, and the deposition of Tonya Rhodes. I know the Court does not expect me to read the motion at this time.

THE COURT: No, no.

MR. WINSLOW: So let me simply respond to the Plaintiff's answer to the motion, if I may.

I believe that the Plaintiff's analysis is inappropriate of whether or not we are talking about a threshold consent to search issue. Most of the cases that he cites in response seem to try to cast this issue in terms of whether or not the officers could effectuate a constitutional search of Mr. West's property based upon Tonya Rhodes' consent to allow us to come in. We were not going in the house to conduct a search.

THE COURT: We or your client?

MR. WINSLOW: My client, Craig McDannel, and if he is able to amend his complaint, Brad Shaw as well. Craig

McDannel went into the house along with Brad Shaw upon invitation.

THE COURT: As I understand it, there's no dispute that this particular woman invited them in; correct?

MR. WINSLOW: I know of no facts to dispute that statement.

THE COURT: I mean, there may be allegations, but there's no evidence, is there?

MR. WINSLOW: Not that I know of, Your Honor. We've taken depositions of virtually everybody available that would have any knowledge, and both Brad Shaw and Craig McDannel are consistent in what they say happen, and the statement of Shari Heffington I think is pretty much absent on that issue of going into detail about what happened as they crossed into the house. Her statement seems to deal primarily with what happened once they were in the house. There's nothing in her statement that refutes what Craig McDannel and Brad Shaw say.

So I think that the proper format or the proper form of the issue is once they were inside the house upon invitation of Shari Heffington, did they have a right, a duty or an obligation to use deadly force under the circumstances that existed. As far as I can tell, there is no dispute that Mr. West was approaching them with a machete, and although words don't describe in the deposition—don't describe very well just how the machete was being held, it was described in the deposition by the witnesses, and basically the way it was is Mr. West was coming toward them with the handle in his right hand of the machete with the blade pointed down toward the floor; and as he was approaching them, within six feet or so, and walking steadily toward them, not responding to their orders for him to stop and to drop the machete, he raised the machete up by bringing his forearm up. As it became parallel with the floor and was continuing to come up, the

blade would still be pointed down, the point would still be pointed down with the blade toward him, but it would be coming up in the direction of being able to direct the blade toward what appeared to be Shari Heffington at the time.

The statement that the point was pointed away from the officers doesn't fully describe the situation. It was a coming up with the knife as though to plunge it downward. It was getting into that position so it could be plunged downward, and only as that was happening was he warned he had another time to stop, and when he didn't slow down or do anything different, his knife was coming up, according to McDannel, at the point he had his arm parallel with the floor and was coming up with it, he fired. And according to Brad Shaw, who was standing right next to him, the shot seemed to have occurred as his hand was about even with his neck.

THE COURT: Your position is no dispute on that?

MR. WINSLOW: I know of no dispute from any facts, Your Honor. I attached all the police reports.

THE COURT: Four people there, one of them is dead, two of them your clients, and the other one is this woman who can't be found or she's not around?

MR. WINSLOW: Well, Brad Shaw is not yet my client. If he is joined to this suit, he would be my client. He is an employee of the Van Buren Sheriff's Department, but yes.

THE COURT: His deposition has been taken, though?

MR. WINSLOW: Yes, that's the position, and his deposition has been taken.

THE COURT: Not inconsistent with your client at all?

MR. WINSLOW: I don't believe there's any inconsistency. The only inconsistency is McDannel thought that he was ready to shoot or going to shoot as the arm was parallel

to the ground, and Brad Shaw said when he fired, it was a little higher when the shot was actually fired. But I don't see that as a conflict.

THE COURT: No.

MR. WINSLOW: The officers entered the house with their guns holstered. They did not enter with a display that would threaten anybody. They went in because they were invited in and were determined to find out what was going on with this reported domestic dispute that Shari Heffington was being chased around the house by a man with a knife.

They had, I suppose, two alternatives. Plaintiffs suggest a third. They had the alternative of what they did, and that was to shoot him. Another alternative was to see was he actually going to stab somebody, which I think would be a gross violation of Shari Heffington's rights. She was there believing she was protected by the police, had every reason to believe she would be protected by the police, and we had a responsibility and obligation to her to protect her civil rights and to keep her from harm. That is a major portion of the officers' responsibilities.

Plaintiff suggests a third alternative, and that is they could have tried to hightail it out of the room. At the point where it appeared that West was not going to relent, was not going to give up his assault, he was four to six feet away. You have a blade on a machete that's two feet long, the reach of a man's arm is at least two feet long. So he was very close to being in striking distance when they finally shot him or when Craig McDannel finally shot him, and he was still walking toward him, closing that space. For three people to get out of that room at once where the door opened inward into the room, where they could not just push it and race out of the house, they would have to open the door toward them, wait for the door to be opened wide enough and then exit single file,

I don't think is a requirement of law that is reasonable under the circumstances.

They had a reasonable belief that what they had to do at that point was to protect themselves and to protect Shari Heffington. I think that our analysis of what a reasonable officer would believe was necessary under the circumstances does not allow for debate. There's simply only one thing an officer can do at that point, and I believe at this juncture it is an issue of law for the Court to decide that the officer is entitled to qualified immunity and was entitled at that time to exercise his right of self-defense. He does not have a duty to run from danger. His job is a dangerous one, and it places him in danger day after day. That's just the nature of it. Every time someone threatens an officer, they can't run away and be doing their job.

Plaintiff also suggests in the verified complaint that the training was so deficient as to demonstrate gross negligence on the part of the training and supervision, that it was so deficient as to make the violation of a person's civil rights substantially certain to occur; and, therefore, violates the Plaintiff's civil rights. The way he attempts to do that is by referring to specific questions of whether or not the officer was trained in how to handle a domestic dispute involving violence. The officer said, No, there's not training on how to handle a domestic dispute involving violence. But I don't think that that question and answer sequence says that they were not trained to handle situations of violence in general.

The questioning went on in the deposition to the effect that they have to handle each domestic situation as it occurs, as it arises. Each one's different, and that a violent situation is really a violent situation whether or not it occurs in the context of a domestic situation or whether it occurs at a traffic stop on the highway or at a liquor store holdup or anything else. The requirements of the

officer to respond to violence is not determined by whether or not it occurs in the context of a domestic dispute. It is also, I believe, not defined by whether or not they are in the Plaintiff's own home when they have to defend themselves, because the Plaintiff clearly had not right to use deadly force against anybody, even in his own home, when they did not enter the home by using deadly force.

Shari Heffington gave every appearance of being rightfully in possession, and the reason I attached some of those prior police reports was not, as Plaintiff suggests, to try to poison the Court, but because there was some interesting information in there. The first one that I attached was a September 10, 1988 report. Shari Heffington was complaining against James West. He had assaulted her then. She had hit him on the head with a beer bottle to make him break off the assault. The reason I attached the report is because it shows that Shari Heffington resides at 310 South East Street, Hartford, Michigan; that James Edward West resides at 310 South East Street, Hartford, Michigan; that the incident occurred at the same home that the incident occurred when Mr. West was fatally wounded. The other report that I dealt with—

THE COURT: But you're not contending and you haven't contended, nor do you have any deposition to contend that the officers, when answering this call, were apprised of these previous police reports and all this information, do you?

MR. WINSLOW: That's correct, Your Honor.

THE COURT: Assuming that's an issue here.

MR. WINSLOW: What I was doing is responding to the Plaintiff's argument that Shari Heffington was nothing more than a trespasser in the house and had no authority to allow us into the house. That would not appear to be borne out by the facts.

THE COURT: That's not a valid argument. She's an adult, isn't she?

MR. WINSLOW: I beg your pardon?

THE COURT: She's an adult, isn't she?

MR. WINSLOW: Yes, she is.

THE COURT: The police aren't to go to the door and say, Who are you, and show me the title to this property and show me the lease. That's absurd. That's not a valid argument.

MR. WINSLOW: Your Honor, I raised about 11 issues in my brief. I don't think that many other of these issues have to be gone into unless you have questions that you'd like me to address.

THE COURT: Not now, thank you.

MR. WINSLOW: Thank you.

THE COURT: Mr. Yingst, are you going to argue this?

MR. YINGST: Thank you, Your Honor.

THE COURT: This is a 1983 cause of action; is that correct?

MR. YINGST: Yes, Your Honor.

THE COURT: Okay. This is governed by, as clear as I can see, Sixth Circuit law under *Jones v. Sherrill*, which I presume and hope you're familiar with. This *Jones v. Sherrill* is a high-speed chase coming out of Tennessee where two police officers, I presume you're familiar with the facts, were chasing a traffic offender apparently at high speed through a metropolitan area, as best I can gather from the facts here, and in the course of chasing this traffic offender, the traffic offender crossed the center line and ran into Mrs. Jones, causing the death of Mrs. Jones, and a lawsuit was begun against the police officers

who were chasing. And if you're listening, let me cite to you Page 1106:

> "The government conduct in pursuing Sherrill does not rise to the level of gross negligence and outrageous conduct necessary to sustain a Section 1983 claim under *Nishiyama*.

Put your pen down, would you please? I'm talking to you.

MR. YINGST: I'm sorry, Your Honor. I was writing down—

THE COURT: That's disrespectful.

MR. YINGST:—the cite that you gave. I apologize to the Court.

THE COURT: Well, you should know *Nishiyama* in order to file this lawsuit and the others you've been filing.

> "*Nishiyama* did not hold that a mere allegation of gross negligence or aggravated negligence would always be enough to withstand a motion to dismiss. Negligence does not become 'gross' just by saying so. If the courts are to make any sense of the distinction between gross negligence and simple negligence, we must ensure that gross negligence is something more than simple negligence 'with the addition of a vituperative epithet." The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with outrageous conduct or arbitrary use of government power. The high speed pursuit alleged in Jones's complaint is not sufficient to state a claim under *Nishiyama*.

Now, what I'm interested in in this case is where is the gross negligence, presuming for a moment that there might be an allegation of simple negligence in this case? The only proofs we have are the officers and this woman who apparently is not available and the deceased; correct?

MR. YINGST: At the present time, Your Honor, yes.

THE COURT: Well, that's my evaluation under *Anderson* and *Celotex* and the other cases. Continue.

MR. YINGST: I'm sorry, Your Honor. You asked me a question and I was—I got lost in it and I didn't follow it.

THE COURT: I'm looking for gross negligence in this case. I think that at the time we were here before on this case, I asked the same question.

MR. YINGST: I don't think we've been here before on this case, Your Honor. But the facts in this case, I believe, are different. This is not pursuing a felon or even any knowledge that involved any conduct that the police officers observed. They're going on information that was conveyed by some male caller to the sheriff's department that was related to the police officers.

THE COURT: Wait a minute. Wait a minute. A felonious assault was committed upon these policemen; correct?

MR. YINGST: I don't believe the facts would bear that out, Your Honor.

THE COURT: Wait a minute. Wait a minute. The policemen are in this home, and a man comes out of a bedroom into the living room area where the policemen are standing; correct?

MR. YINGST: That's correct, from the testimony, yes, Your Honor.

THE COURT: That's all I can work from is the testimony, not the allegations.

MR. YINGST: From the testimony, yes, Your Honor.

THE COURT: All we're talking about is from the testimony. And from the testimony, the knife is moved in a threatening gesture, from the testimony?

MR. YINGST: That is a conclusion that I would contend, Your Honor, that you do not need to infer that it was

threatening. That is Counsel's description of what occurred. There was some conflict in the testimony of the two officers on that point, and there's also conflict as to how far away Mr. West was.

THE COURT: No, let's back up a minute. The man was advancing toward the policemen; correct?

MR. YINGST: Yes.

THE COURT: And he had a knife?

MR. YINGST: Yes.

THE COURT: And he was told three or four different times, Drop the knife?

MR. YINGST: From the testimony of the officers, yes, Your Honor.

THE COURT: Well, is there any other testimony?

MR. YINGST: Not at this point, Your Honor.

THE COURT: Do you have any other witnesses that observed it?

MR. YINGST: Well, of course, there is Shari Heffington, who has not yet been deposed.

THE COURT: Do you have an affidavit from her to the contrary?

MR. YINGST: No, I do not, Your Honor.

THE COURT: Okay. He's advancing on the officers, he's told to drop the knife, and both officers—there is some variance in their testimony, but both officers contend that the arm was in the process of being raised up; correct?

MR. YINGST: Yes. The officer that did the shooting contended that the knife was pointing to the floor. The officer who did not do the shooting claimed that it was higher.

THE COURT: But it was in the process of being raised.

MR. YINGST: That's correct, Your Honor. That is their testimony.

THE COURT: What is missing? You know, what is missing in the elements of a felonious assault?

MR. YINGST: In terms of whether or not Mr. West was actually assaulting them is a judgment call on the part of the officers and on the part of whoever's going to determine that that is the fact. When he is coming out of the room, from their own testimony, at that point there is no claim that he was engaged in a felony or that they had seen a felony in their presence, and coming out of the room under the circumstances as they were then did not justify believing that he was anything other than a person in his own home who had a legal right to be there. And the distance—the conduct of the officers in determining whether or not their conduct was subjectively reasonable would take into account a number of factors. One important one is in dispute, which is how far away he was when this shot occurred.

THE COURT: Wait a minute. Wait a minute. I don't know if we live in the same world. He's coming, he's leaving the bedroom or this other room with a knife, big knife,24-inch blade, machete.

MR. YINGST: Yes.

THE COURT: No dispute?

MR. YINGST: No dispute.

THE COURT: He's coming toward two uniformed officers. No dispute?

MR. YINGST: I would have to say no dispute, yes.

THE COURT: These aren't difficult issues, are they, factually?

MR. YINGST: Well, where they were standing and how the room is set up, there is, because coming out of the

room does not—it's not a simple matter that he just walked out of the room and walked directly toward the officers.

THE COURT: No, no. He had to walk through the room, it was actually two rooms in length.

MR. YINGST: He never got to the other room. He had to maneuver around a couch, and if he was shot as soon as he came out of this room where the door that covered up the bullet that is alleged to have killed him was all splattered with blood, the argument of where he was at that point, whether he was further than where they—where the testimony is is in dispute. They claim four to six feet. The distance when he first walked out of that door is much further than four to six feet.

THE COURT: Do we have any testimony other than their testimony in this case?

MR. YINGST: The police officers? Not at this point, Your Honor.

THE COURT: Go ahead and argue.

MR. YINGST: We have spent a great deal of time, Your Honor, compiling a brief and comparing exhibits for the Court, and copies of the deposition testimony were submitted to the Court. It is my claim, Your Honor, that the cases that we have cited adequately apprise the Court of our authority that we rely upon, and the emphasis that I would say that the Court should focus on in making any decision at this point would be *Canton v. Harris* and *McKinnon v. Berwyn* which were cited in our brief. On the issue particularly of gross negligence that the Court raised, *McKinnon* addresses that, which I think contained facts more analogous to this case.

I want to say again, Your Honor, that at this point we have not concluded discovery. The experts that we have talked to and the evidence that we have gotten from the State Police on how the shot occurred raises serious ques-

tions as to how the shooting—whether the shooting occurred the way the police officers say it did.

The defense at this point in attempting to argue the objective reasonableness standard based on what occurred inside the house, there are two separate considerations here for the Court in determining both subjective reasonable—determining objective reasonableness and how the police officers became involved in that situation and entered the house is part of what I believe the Court should consider. In response to some of Mr. Winslow's comments, I've heard the Court's comments on whether or not the consent could be properly given and whether or not the justification to go in the house was proper. I won't go over that. I think we've laid it out in our brief.

THE COURT: But do you have any evidence in this case? I mean, I have a trilogy of cases from the United States Supreme Court in 1986 telling me the standard to use in summary judgment. It's different than in the state court. It's much different than that. Is there any evidence—affidavits, tape recordings, photographs—that contradict the officers' testimony as to why they were at this residence and how they got into the residence?

MR. YINGST: Other than what we have submitted to the Court at this point, Your Honor, I have none other to give to the Court.

THE COURT: No, that doesn't answer my question. Do you have any evidence contradicting the officers?

MR. YINGST: I believe what we have submitted does contradict the officers in terms of the inference the Court would have to draw from what they have said. For example, the police report contends in the one instance that there are no powder burns on this man's shirt.

THE COURT: No, no. As to why the officers were where they were at the time that the incident took place, as to how they got to the residence and how they got into the

residence and what their purpose for being there was, is there any contradiction as to that from the officers' testimony thus far, any?

MR. YINGST: The way the Court has asked the question, I can't answer it directly. I believe that if the Court is saying did they arrive there in response to a call, yes, I believe that is borne out by their testimony, and we have nothing to contradict that.

THE COURT: That was my question.

MR. YINGST: Sir?

THE COURT: That was my question.

MR. YINGST: All right. On what was actually said and how the officers decided that it was appropriate under those circumstances to enter the home, that is not at all clear.

Now, do we have someone to say categorically to the contrary, they didn't have any right to go in there, they shouldn't have gone in there under the circumstances, we do, as the Court has noted, have opinion testimony on that, but that is not a factual—those are not fact witnesses. We do have opinion testimony from one of the leading police experts in the country, whose opinion it is that the entry on the basis of the facts that were contained in the police reports and the statements by the officers at that time was unreasonable and grossly negligent under these circumstances.

THE COURT: Is that Mr. West's brother-in-law?

MR. YINGST: No, that's Dr. Kirkham.

THE COURT: Do we have his affidavit in here?

MR. YINGST: Yes. I believe it's Exhibit Number 12 of our brief, Your Honor.

THE COURT: Continue.

MR. YINGST: The other thing is, Your Honor, that although we requested by subpoena all of the policies and procedures of the Van Buren Sheriff's Department, we were not provided all of them. What we were provided, we submitted to the Court. It is my understanding that there are no other policies that would be relevant to the issues that are before the Court in this matter, and that to the extent that the policies exclude any training, it is our contention that failure to train in the particular areas that we've alleged in our brief is a basis for a factual determination as to whether or not there was gross negligence. I believe we have set it out in the documents that we have submitted to the Court and in the brief I submitted.

Unless the Court has any further question, that is all that I would say at this time, Your Honor.

THE COURT: Thank you. Thank you, sir. Thank you.

Response?

MR. WINSLOW: Well, I would only point out, Your Honor, that with respect to the last point, that the so-called reckless disregard of training and supervision would only be an issue if, first of all, there was an improper use of deadly force; and second of all, if the improper use of deadly force was caused by the lack of training or supervision. Here that doesn't seem to be a reasonable interpretation or inference from the facts.

Does the Court have any questions of me?

THE COURT: No, no. Thank you. Thank you, both of you.

I intend to write on this matter. I have some of my ideas already sketched out. A couple issues here have been raised I want to go back and pursue in this case. I want to follow through with some more law here on this gross negligence issue. I'm troubled by it in this case, very can-

didly, and I should have something together certainly within the next 30 days and it should be on its way to you, my opinion in this matter, very shortly. Thank you, both of you. (Proceedings concluded at 9:30 a.m.)

CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier
U.S. District Court Reporter
315 W. Allegan St.
Lansing, MI 48933

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILE NO. G89-50761-CA

Hon. Robert Holmes Bell

TONYA RHODES, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES EDWARD WEST, DECEASED,

Plaintiff,

v.

CRAIG MCDANNEL, H. CAL ROSEMA, in his official capacity as VAN BUREN COUNTY SHERIFF, VAN BUREN COUNTY SHERIFF'S DEPARTMENT, and VANBUREN COUNTY, Jointly and Severally,

Defendants.

OPINION OF THE COURT

Plaintiff, James West's daughter, brings this action as personal representative of the Estate of James West, Deceased, pursuant to 42 U.S.C. §§ 1983 and 1988. Plaintiff claims that defendant Craig McDannel deprived West of his civil rights by the unreasonable use of deadly force. Plaintiff claims that the remaining defendants deprived West of his civil rights by failing to properly train and supervise defendant McDannel. Now before the Court is defendants' motion to strike and dismiss plaintiff's complaint and application for sanctions.

The following facts are undisputed. On March 7, 1989 at approximately 11:00 p.m., the Van Buren County Sher-

iff's Department received a call that a woman was being chased around a house on East Street in Hartford, Michigan by a man with a knife. Two cars containing Deputies McDannel, Shaw, Lux and Craft responded. Deputies Lux and Craft secured the outside of the house and Deputies McDannel and Shaw went to the door. The complainant, Sherri Heffington, West's girlfriend, met McDannel and Shaw at the door and invited them into the house. Heffington indicated that West was still in the house and still had the knife but that she did not know where he was.

While McDannel and Shaw were in the living room, West entered the living room area from a back bedroom. Deputy Shaw drew his gun when he saw what he believed to be a gun in West's hand. Deputy McDannel drew his gun when he saw that West was holding a knife with a 24" blade. The officers told West five or six times to drop the knife and to stop his advance. West did neither. West continued forward and began raising the knife. The officers again told West to stop and drop the knife. West did not drop the knife and continued toward Heffington and the officers. When West was four to six feet from Heffington and the officers, McDannel fired his weapon at West.[1] West was hit in the chest and died from his wounds.

Fed.R.Civ.P. 12(b) provides that, if on a Rule 12(b)(6) motion matters outside the pleadings are submitted to the Court and the Court considers them, the Court shall treat the motion as one for summary judgment under Fed.R.Civ.P. 56. Both plaintiff and defendants have submitted documents outside the pleadings in support of their arguments. The Court has considered those documents and will treat this motion as one for summary judgment.

On a motion for summary judgment, the Court reviews the evidence in a light most favorable to the nonmoving

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[1] Plaintiff suggests that the distance might be different but has not come forward with any facts to support a greater or lesser distance.

party. The moving party has the burden of showing the Court that "there is an absence of evidence to support the nonmoving party's case." *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265, 275 (1986). The nonmoving party must present the Court with specific facts which demonstrate that there is a genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986). Summary judgment is precluded if there is a dispute with regard to a fact "that might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202, 211 (1986).

Defendants argue that McDannel was privileged to use the force he did and that he is immune from liability in this case. In her response to defendants' motion, plaintiff alleged two bases for defendant McDannel's liability. Plaintiff stated:

> Defendant McDannel is liable (1) for creating the situation which caused the need for alleged self defense, and (2) for the actual use of unnecessary deadly force.

With regard to the first basis for liability, plaintiff argues that defendant McDannel was negligent because he failed to plan the approach to this situation, failed to remove Heffington from the house at the first opportunity and failed to retreat when approached by West. Plaintiff alleges that these failures, in addition to the use of deadly force, amounted to gross negligence. The Sixth Circuit Court of Appeals has stated:

> Negligence does not become "gross" just by saying so. If the courts are to make any sense of the distinction between gross negligence and simple negligence, we must ensure that gross negligence is something more than simple negligence "with the addition of an vituperative epithet." *Wilson v. Brett*, 11 M. & W. 113, 152

> Eng.Rep. 737 (Ex. 1843). The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials with outrageous conductor arbitrary use of government power.

Jones v. Sherrill, 827 F.2d 1102, 1106 (6th Cir. 1987). An earlier Sixth Circuit case set forth a definition of "gross negligence." The Court stated:

> We acknowledge that the term "gross negligence" evades easy definition. In our view, a person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Nishiyama v. Dickson County, Tenn., 814 F.2d 277, 282 (6th Cir. 1987).

In a case which is almost on point with the instant case, the Sixth Circuit Court of Appeals found that it was not gross negligence for police officers not to consider all of the alternatives available to them. *Brandenburg v. Cureton*, 882 F.2d 211, 214, (6th Cir. 1989). In *Brandenburg*, three police officers went to the Brandenburg property to serve a peace warrant. The warrant was issued the day before the officers attempted to serve it. The officers had been warned by the persons seeking the peace warrant that there "might be trouble." The officers did not make any preparation or plan for how they might serve the warrant. The Court found that such lack of preparation did not rise above the level of mere negligence. *Id.* In the instant case, the police officers were responding to a call about a incident occurring at that time and were told that a woman was being chased by a man with a knife. The failure of the officers to take an alternative action in a response

situation certainly does not rise to a level of negligence higher than that in *Brandenburg*. Defendant McDannel's failure to formulate a plan of action does not rise to the level of gross negligence.

Plaintiff further argues that defendant McDannel was grossly negligent in going into the house with Heffington. Defendant McDannel, at the time, believed that there was a man with a knife in the house. Therefore, defendant McDannel did take a risk when entering the house. However, the Court finds that the risk was not "of a magnitude such that it is highly probable that harm will follow." *Nichiyama*, 814 F.2d at 282. If defendant McDannel's information had been that the man had a gun, the Court might, under the right circumstances, find that defendant McDannel's entry into the house was an act that was more than merely negligent. In this case, the Court finds that it is not "highly probable" that a man with a knife would continue to advance on two officers who had guns drawn. Defendant McDannel's actions in entering the house were not grossly negligent.

Plaintiff argues that defendant McDannel should have retreated rather than confront West when West continued his advance. Plaintiff does not provide the Court with any legal basis to support his contention that a police officer must retreat when faced with a threat. Defendant McDannel's action in staying in the house does not constitute gross negligence.

Finally, plaintiff argues that defendant McDannel's use of deadly force was unreasonable. "The use of deadly force is reasonable if an officer believes that there is a threat of serious physical harm to the officer or others." *Brandenburg*, 882 F.2d at 215. There is no dispute that West continued to advance toward the officers with a knife with a 24 inch blade in spite of several warnings to stop and drop the knife. There is also no dispute that West was raising the knife when he was shot. The only facts that

plaintiff raises to dispute the reasonableness of defendant McDannel's actions are that West had not raised the knife all the way up, that West was suffering from disabling arthritis in his hands, that West had the knife in his right hand and West was left handed, that the knife could not have fallen on the couch after West was shot and that there is a question as to whether the bedroom door was open or closed when West was shot. Further, in her supplemental brief in opposition to defendants' motion, plaintiff attaches the affidavit of a criminologist which stated that the "trajectory and position of the shooter" is different than that stated by the officers. None of these facts are facts "that might affect the outcome of the suit." *Anderson, supra.* None of these facts dispute the fact that West was raising a knife with a 24 inch blade while advancing on the officers.

The only "fact" raised by plaintiff which might have a bearing on the level of negligence attributed to defendant McDannel is the affidavit of the criminologist. However, even that "fact" only suggests that West and McDannel were in different positions. It does not dispute the fact that West was advancing on the officers with a knife with a 24 inch blade. Plaintiff would have the Court speculate that this "evidence" leads to an inference that the positions of West and defendant McDannel were sufficiently different to lead to the conclusion that defendant McDannel was guilty of gross negligence. This "fact," as well as the inferences plaintiff would have the Court make from the facts in the previous paragraph, seems designed to cast doubt on the credibility of the officers. Neither this "fact" or the inferences raises a question as to the level of negligence involved. Plaintiff, as the nonmoving party, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475

U.S. at 586, 89 L.Ed.2d at 552. Defendants' motion for summary judgment will be granted.[2]

Defendants seek Rule 11 sanctions against plaintiff because plaintiff stated in her deposition that she did not personally know the facts stated in her complaint. Plaintiff argues that she relied on the information supplied by the investigation of her attorneys. Plaintiff's attorneys also attached affidavits to their brief in opposition to defendants' motion for sanctions which detailed the investigation and research which had been done.

Fed.R.Civ.P. 11 required that every pleading, motion, or other paper of a party be signed by at least one attorney of record in the attorney's individual name or the party if appearing pro per. The signature constitutes a certification that the attorney or party has: (1) read the document, (2) that to the best of the signer's knowledge, information, and belief derived from reasonable inquiry, that the document is (3) well grounded in fact and (4) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (5) that the document is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation. Thus, violations may arise from a deficient inquiry into the factual and legal basis for a pleading, motion, or other paper, or from an improper purpose.

Rule 11 has several purposes: to penalize the offender, to compensate the offended, and to deter the offending party and others from abusing litigation. However, the primary purpose of Rule 11 is to deter abusive litigation. *See* Notes of the Advisory Committee on Rules, 1983 Amendments ("ACN"). 97 F.R.D. 197; S. Kassin, *An Empirical Study of the Rule 11 Sanctions* 29 (Federal Judicial Center 1985).

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[2] In light of this dispositive opinion, the court will not rule on defendants' motion for protective order filed December 8, 1989.

According to the Advisory Committee on Rules, the rule was not designed to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Further, courts "should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *See* ANC, 1983 Amendments.

Imposition of sanctions where appropriate should be designed to achieve the several purposes of the rule, emphasizing the rule's primary purpose of deterring abusive litigation. ~~Such~~ sanctions may include the awarding of attorney's fees or some lesser sanction such as a reprimand for example. The court must consider character of the violation, deficient inquiry or improper purpose, and the possible effects of particular sanctions, chilling meritorious litigation or encouraging "satellite" Rule 11 litigation as a fee-shifting device.

This Court has thoroughly reviewed the pleadings, motions and other papers filed in this case. The Court questions plaintiff's pursuit of this case in light of the lack of dispute with regard to the essential facts. In light of the gross negligence standard in the Sixth Circuit for section 1983 actions, the Court believes that this case comes very close to crossing the line into a justifiable award of Rule 11 sanctions. However, the plaintiff's attorney did provide the Court with information that considerable investigation had been done prior to filing this lawsuit. Accordingly, the Court will deny defendants' motion for sanctions.

An order in accordance with this opinion will issue forthwith.

Dated: December 13, 1989

HON. ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Certified As A True Copy
C. Duke Hynek, Clerk
By /s/ IKdack
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date DEC 13 1989

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILE NO. G89-50761 CA

Hon. Robert Holmes Bell

TONYA RHODES, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES EDWARD WEST, DECEASED,
Plaintiff,

v.

CRAIG MCDANNEL, H. CAL ROSEMA, in his official capacity as VAN BUREN COUNTY SHERIFF, VAN BUREN COUNTY SHERIFF'S DEPARTMENT, and VANBUREN COUNTY, Jointly and Severally,
Defendants.

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89 DEC 13 AM 10:17
CLERK, U.S. DIST COURT
WESTERN DIST OF MICH

ORDER OF THE COURT

In accordance with the Court's written opinion dated December 13, 1989,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed,

IT IS FURTHER ORDERED that defendants' motion for sanctions under Fed.R.Civ.P. 11 is denied.

IT IS SO ORDERED.

Dated: December 13, 1989

/s/ Robert Holmes Bell
HON. ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Certified As A True Copy
C. Duke Hynek, Clerk
By /s/ TKdack
Deputy Clerk

U.S. District Court
Western Dist. of Michigan
Date DEC 13 1989

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILE NO. G89-60761

TONYA RHODES, Personal Representative
of the Estate of JAMES EDWARD WEST,
Deceased,

Plaintiff,

-v-

CRAIG MCDANNEL, H. CAL ROSEMA,
in his official capacity as Van Buren County
Sheriff, VAN BUREN COUNTY SHERIFFS
DEPARTMENT, and VAN BUREN COUNTY,
jointly and severally,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

NOW COMES Plaintiff by her attorneys, BOOTHBY ZIPRICK & YINGST, and, for her Complaint say as follows:

Jurisdiction

1. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988 for violations of the Plaintiff's constitutional rights as embodied in the fourth, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. 1343, *Monell v. Department of Social Services of the City of New York*, 98 S. Ct. 2018 (1978), and the aforementioned statutory and constitutional provisions. Plaintiff further invokes the pendant jurisdic-

tion of this Court to consider claims arising under state law.

2. The amount in controversy exclusive of interests and costs exceeds the sum of FIFTY THOUSAND ($50,000) Dollars.

Parties

3. Plaintiff hereby incorporates by reference Paragraphs 1-2 above.

4. That the Plaintiff Tonya West Rhodes is a citizen of the United States and a resident of the State of Michigan. She is the personal representative of the estate of James Edward West. Letters of Authority were issued to her on April 4, 1989. She sues as the personal representative of the estate.

5. The Plaintiff's decedent is James Edward West and was at all times relevant hereto a citizen of the United States and a resident of the State of Michigan, residing in Hartford, Michigan, born January 29, 1944.

6. That Defendant Craig McDannel is and was at all pertinent time periods an employee of the Sheriff Department of Van Buren County in the capacity of a deputy sheriff. He is believed to be a resident of Van Buren County.

7. That Defendant H. Cal Rosema is and was at all times relevant to this Complaint Sheriff of the Van Buren County Sheriff's Department. As such he was the commanding officer of Defendant McDannel and was responsible for training, supervision, and conduct of Defendant McDannel as set forth more fully below. He is also responsible for enforcing the regulations of the Van Buren County Sheriff's Department and for ensuring that Van Buren County Sheriff's deputies obey the laws of the State of Michigan and the United States.

8. That Defendant Van Buren County is an entity within the State of Michigan and at all times relevant hereto employed the Defendants McDannel and Rosema.

9. That Defendant Van Buren County Sheriffs Department is located in the County of Van Buren, State of Michigan.

10. That all times relevant hereto and in all of their actions described herein, Defendants were acting under color of law and pursuant to their authority as deputy sheriff and sheriff.

COUNT I

11. Plaintiff hereby incorporates by reference Paragraphs 1-10 above.

12. On March 7, 1989, Defendant Craig McDannel, acting in his official capacity as a deputy sheriff of the Van Buren County Sheriff's Office, within the scope of his employment and under color of state law purposefully, knowingly and maliciously used excessive and deadly force in violation of the Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution by shooting Plaintiff recklessly and without legal authority and even though Plaintiff presented no threat to him or others.

13. As a direct and proximate result of the above described malicious and unlawful acts of Defendant McDannel, James West suffered grievous bodily harm and loss of life, all which is in violation of his rights under the laws and the constitution of the United States, in particular, the First, Fourth, Fifth, Eighth and Fourteenth Amendments thereof and 42 U.S.C. §§ 1983 and 1988.

14. That James West was the victim of summary execution at the hands of Defendant McDannel. The punishment administered was grossly disproportionate to

whatever James West's acts may have been, constituted cruel and unusual punishment, and deprived him of the right to due process of law under the laws and Constitution of the United States, in particular the Fourth and Fourteenth Amendments thereof. The shooting of James West by Defendant McDannel was unwarranted, cruel, inhuman, unjustifiable and excessive.

15. The failure of Defendants Van Buren County, and the Van Buren County Sheriff to provide supervision and training regarding the lawful use of an officer's service revolver amounts to gross negligence and a deliberate indifference to the safety and lives of the citizens of the City of Hartford and the County of Van Buren. This gross negligence was the proximate cause of the death of Plaintiff's decedent.

16. The lack of training was so reckless and grossly negligent that the deprivations of the constitutional rights of James West were substantially certain to result.

17. That the Defendant Van Buren county failed to adequately train its police officers, acting recklessly and with gross negligence. The failure to train amounting to deliberate indifference to the rights of parties with whom the deputy sheriff come in contact.

18. That Defendant Van Buren County and Van Buren County Sheriff's Department failed to establish procedures and to train personnel to protect against the actions which resulted in the death of James West.

19. That the failure and lack of training and supervision by Defendant County and Sheriff's department is grossly inadequate or nonexistent.

WHEREFORE, as to all Counts alleged herein, Plaintiff seeks damages in any reasonable and proper amount in excess of Fifty Thousand ($50,000), as shall be determined by a jury, plus interest, costs and attorneys fees.

COUNT II

20. Plaintiff hereby incorporates by reference Paragraphs 1-19 above.

21. That the Defendant McDannel acted in reckless disregard for the value of human life and was reckless and negligent in the use of his firearm.

WHEREFORE, as to all Counts alleged herein, Plaintiff seeks damages in any reasonable and proper amount in excess of Fifty Thousand ($50,000), as shall be determined by a jury, plus interest, costs and attorneys fees.

COUNT III

22. Plaintiff hereby incorporates by reference Paragraphs 1-21 above.

23. Because of the acts alleged herein, the continued employment of Defendant CRAIG MCDANNEL by Defendant Van Buren County Sheriff's Department in any capacity where he carries a revolver and/or other weapon presents a clear and present danger to all citizens in Van Buren County and could result in further illegal use of force and violence by the Defendant.

COUNT IV
Loss of Society

24. Plaintiff hereby incorporates by reference Paragraphs 1-23 above.

25. That decedents children have suffered loss of support, love, care, affection, companionship, comfort and protection.

WHEREFORE, Plaintiff respectfully requests that the following relief, jointly, and severally against all the Defendants:

A. A declaratory judgment that the policies, practices, and acts complained of herein are illegal and unconstitutional.

B. A preliminary and permanent injunction preventing Defendant Van Buren County Sheriff's Department and the County of Van Buren from employing Deputy Sheriff Craig McDannel in any capacity where he would carry a revolver and/or any other weapon.

C. Compensatory damages in the amount of $30,000,000.

D. Punitive damages in the amount of $7,000,000.

E. Prejudgment interest.

F. Such other relief as the Court may deem appropriate, including costs and reasonable attorneys' fees.

DEMAND FOR TRIAL BY JURY

NOW COMES Plaintiff, through her attorneys, BOOTHBY ZIPRICK & YINGST, and hereby demands a trial by jury on all issues.

I DECLARE UNDER PENALTIES OF PERJURY THAT THIS COMPLAINT HAS BEEN EXAMINED BY ME AND THAT THE CONTENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

DATED: August 9, 1989

/s/ Tonya West Rhodes
TONYA WEST RHODES, Personal Representative

BOOTHBY, ZIPRICK & YINGST
Attorneys for Plaintiff

By: /s/ Robert A. Yingst
ROBERT A. YINST P22624

By: /s/ Holly F. Underwood
HOLLY F. UNDERWOOD P41727
Business Address:
9047 U.S. 31 North, Suite 201
Berrien Springs, MI 49103
Telephone: (616) 471-7787

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT–SOUTHERN DIVISION

Case No. G89- 50761 CA

TONYA RHODES, Personal Representative of the Estate of JAMES EDWARD WEST, Deceased

Plaintiff,

v

CRAIG McDANNEL, H. CAL ROSEMA, in his official capacity as Van Buren County Sheriff, VAN BUREN COUNTY SHERIFF'S DEPARTMENT, and VAN BUREN COUNTY, jointly and serverally,

Defendant.

Robert A. Yingst (P22624)
Attorney for Plaintiff
9047 U.S. 31 North, Ste 201
Berrien Springs, MI 49103
(616) 471-7787

Cummings, McClorey, Davis & Acho, P.C.
By: Richard H. Winslow (P22449)
Attorney for Defendants
401 Comerica Bldg
25 W. Mich. Mall
Battle Creek, MI 49017
(616) 963-7800

ANSWER TO PLAINTIFF'S COMPLAINT

NOW COME your Defendants Craig McDannel, H. Cal Rosema, Van Buren County Sheriff's Department and Van Buren County by and through their attorney Cummings,

McClorey, Davis & Acho, P.C., and in Answer to Plaintiff's Complaint shows onto this Honorable Court as follows:

1. Defendants deny Plaintiff's pleadings allege specific violations of 42 USC 1983, 1988, and violations of 4th, 5th and 14th Amendment Rights and deny Plaintiff has established a cause of action under State law such that pendant jurisdiction is appropriate for the reason that no State cause of action is set forth, nor did any violation of Plaintiff's civil rights occur.

2. Defendants neither admit nor deny the allegations contained therein for the reason that Defendants are without sufficient information to respond and leave Plaintiff to her proofs.

3. No answer necessary.

4. Defendants neither admit nor deny the allegations contained therein for the reason that Defendants are without sufficient information to respond and leave Plaintiff to her proofs.

5. Defendants neither admit nor deny the allegations contained therein for the reason that Defendants are without sufficient information to respond and leave Plaintiff to her proofs.

6. Defendants admit the allegations contained therein.

7. Defendant H. Cal Rosema admits that all times pertinent, he was Sheriff of the Van Buren County Sheriff's Department being the highest level and chief executive officer. Defendants deny that he was responsible for training, for the reason that his duties are upper level administrative and supervisory rather than that of an instructor. Defendants further deny that he was directly responsible for the supervision and conduct of Craig McDannel for the reason that lower ranking supervisors are responsible to supervise Deputy McDannel and neither Federal nor State law recognizes respondeat superior liability for the conduct

of subordinate sheriff deputy. Defendants further deny that he is responsible for ensuring deputies obey the laws for the reason that said allegations are vague, overly broad and incorrectly state the applicable law.

8. Defendants admit the allegations contained therein.

9. Defendants deny that Van Buren County Sheriff's Department is a legal entity subject to suit and shows that said "Defendant" should be dismissed as improperly named and joined.

10. Defendants admit that they were acting under color of law, pursuant to their duty as Deputy Sheriff and Sheriff but rely upon individual responses to the Plaintiff's averments as set forth hereafter.

COUNT I

11. Defendants hereby incorporate by reference their answers to paragraphs 1 through 10.

12. Defendants admit that Deputy McDannel used deadly force against James West under color of law but deny the remaining allegations for the reason that the same are untrue as a matter of law and fact.

13. Defendants admit that James West died as a result of the use of deadly force by Deputy McDannel but deny the remaining allegations contained therein for the reason that the same are untrue as a matter of law and fact.

14. Defendants deny the allegations contained therein for the reason that the same are untrue.

15. Defendants deny the allegations contained therein for the reason that the same are untrue.

16. Defendants deny the allegations contained therein for the reason that the same are untrue.

17. Defendants deny the allegations contained therein for the reason that the same are untrue.

18. Defendants deny the allegations contained therein for the reason that the same are untrue.

19. Defendants deny the allegations contained therein for the reason that the same are untrue.

WHEREFORE your Defendants pray this Honorable Court to dismiss Plaintiff's Complaint together with costs and reasonable attorney fees as provided by 42 USC 1988, Federal Rules Civil Procedure 11 and MCL 600.2411.

COUNT II

20. Defendants hereby incorporate by reference their answers to paragraphs 1 through 19.

21. Defendants deny the allegations contained therein for the reason that the same are untrue.

WHEREFORE your Defendants pray this Honorable Court to dismiss Plaintiff's Complaint together with costs and reasonable attorney fees as provided by 42 USC 1988, Federal Rules Civil Procedure 11 and MCL 600.2411.

COUNT III

22. Defendants hereby incorporate by reference their answers to paragraphs 1 through 21.

23. Defendants deny the allegations contained therein for the reason that the same are untrue.

WHEREFORE your Defendants pray this Honorable Court to dismiss Plaintiff's Complaint together with costs and reasonable attorney fees as provided by 42 USC 1988, Federal Rules Civil Procedure 11 and MCL 600.2411.

COUNT IV

24. Defendants hereby incorporate by reference their answers to paragraph 1 through 23.

25. Defendants neither admit nor deny the allegations contained therein for the reason that Defendants are without sufficient information to respond and leave Plaintiffs to their proofs.

WHEREFORE your Defendants pray this Honorable Court to dismiss Plaintiff's Complaint, to deny all declaratory and injunctive relief sought by Plaintiff and to grant attorney fees provided by 42 USC 1988, Federal Rule of Civil Procedure 11 and MCL 600.2411.

AFFIRMATIVE DEFENSES

PLEASE TAKE NOTE that upon litigation of the above captioned actions your Defendants will offer the following Affirmative Defenses:

1. That the entity named as Van Buren County Sheriffs Department is not a legal entity subject to suit and should be dismissed summarily.

2. That Plaintiff failed to state a claim upon which relief may be granted against the Van Buren County Sheriffs Department.

3. Plaintiff's Complaint fails to state a claim upon which relief may be granted against H. Cal Rosema in his official capacity as Van Buren County Sheriff.

4. Plaintiff's Complaint fails to state a claim upon which relief may be granted against Craig McDannel.

5. Plaintiff's Complaint fails to state a claim sufficiently specific to plead facts or theories for recovery under claimed violations of

a. First Amendment Rights

b. Fourth Amendment Rights

c. Fifth Amendment Rights

d. Eighth Amendment Rights

e. Fourteenth Amendment Rights

f. Section 42 USC 1983

g. 42 USC Section 1988

h. Paragraph H MCL 691.1407; and

that Defendants are entitled to governmental immunity as provided by said statute for the alleged claims under State law.

6. As the highest elected executive of the Van Buren County Sheriff's Department, H. Carl Rosema enjoys absolute immunity.

7. Plaintiff fails to state a cause of action claimant H. Cal Rosema is liable for actions and conduct of a deputy pursuant to MCL 51.70.

8. Defendant Craig McDannel was privileged to use deadly force in the performance of his official capacities as a law enforcement officer.

9. Defendant Craig McDannel was privileged to use deadly force in the exercise of self-defense for himself and those for whom he was obligated to protect, including Shari Hoffington, when confronted with an assailant armed with a deadly weapon.

10. Plaintiff was guilty of negligence or reckless and grossly negligent conduct in approaching Defendant McDannel in a threatening manner, armed with a deadly weapon, and in failing to obey the lawful orders of the law enforcement officer to stop and put down his weapon where Deputy McDannel openly displayed his service revolver.

11. That Craig McDannel is entitled to qualified immunity of good faith in the use of deadly force when threatened by Plaintiff with imminent deadly force where James West steadily continued to advance toward the Defendant with a large machete in a menacing manner,

within the distance of 4 feet and while disregarding orders to stop and drop the machete, particularly after Defendant had been advised that James West had been chasing Shari Hoffington with a knife immediately before he arrived at the scene thereby establishing probable cause to believe a felony had been committed by James West and that the assaultive behavior coupled with the present means to inflict serious and fatal injury in the presence of Defendant McDannel constituted the commission of a serious and dangerous felony in his presence.

12. Plaintiff fails to plead facts or theory upon which recovery may be obtained under the principal of respondeat superior both as to Federal and State claims.

13. Defendant McDannel was a duly trained and State certified law enforcement officer solely and adequately qualified and trained in the proper use and exercise of care with his service revolver in compliance with all governmental agency requirements.

14. Defendants reserve the right to amend their Answer to include such additional Affirmative Defenses as shall become known through the course of pre-trial discovery and/or litigation in the above captioned action.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.C.

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Supreme Court, U.S.
FILED
NOV 25 1991
OFFICE OF THE CLERK

No. 91-692

In The

Supreme Court of the United States

October Term, 1991

TONYA RHODES, Personal Representative of the Estate of JAMES EDWARD WEST, Deceased,

Petitioner,

v.

CRAIG McDANNEL, H. CAL ROSEMA, in his official capacity as Van Buren County Sheriff, VAN BUREN COUNTY SHERIFF'S DEPARTMENT and VAN BUREN COUNTY,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT ADDITIONAL DISCOVERY WAS UNNECESSARY BECAUSE THE PLAINTIFF COULD NOT SUGGEST AN OUTCOME-DETERMINATIVE FACT THAT WOULD HAVE BEEN REVEALED THROUGH ADDITIONAL DISCOVERY, AND SUFFICIENT OPPORTUNITY FOR DISCOVERY HAD OCCURRED?

II.

WHETHER THE DEPUTIES' ENTRANCE WITH IMPLICIT CONSENT AND UNDER EXIGENT CIRCUMSTANCES INTO THE HOME WAS PERMISSIBLE WHERE THEY WERE ESCORTED IN BY THE COMPLAINANT, WHO HAD INDICATED SHE WAS BEING CHASED BY A MACHETE-WIELDING ASSAILANT?

III.

WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS ON THE ISSUE OF EXCESSIVE FORCE WHERE REASONABLE MINDS COULD ONLY CONCLUDE THAT THE DEPUTIES WERE ACTING TO PROTECT A CITIZEN AND IN SELF DEFENSE WHEN CONFRONTED BY THE PLAINTIFF'S DECEDENT, WHO WAS ATTACKING WITH A 23-24 INCH MACHETE WHILE IGNORING ANY REQUEST TO HALT?

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Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Respondents, CRAIG McDANNEL, CAL ROSEMA, VAN BUREN COUNTY SHERIFF'S DEPARTMENT, and VAN BUREN COUNTY, request that this Honorable Court deny Petitioner's, TONYA RHODES', Personal Representative of the Estate of JAMES EDWARD WEST, Request for Writ of Certiorari to review the Order of the 6th Circuit Court of Appeals dated June 10, 1991. The Petition was docketed at the United States Supreme Court on October 28, 1991.

ORDERS AND OPINIONS BELOW

Respondents rely on the Order and Opinions submitted in the Petitioner's Petition for Writ of Certiorari and its Appendices.

JURISDICTION

This case involves allegations of federal civil rights violations brought pursuant to 42 U.S.C. 1983 asserting a

violation of the 4th Amendment as a result of a fatal shooting that occurred when the individual Deputies fatally wounded the Plaintiff's Decedent as a result of the Plaintiff's Decedent's unyielding confrontation and attack with a 23-24 inch machete upon the deputies and a female citizen.

COUNTER-STATEMENT OF THE CASE

The Plaintiff/Petitioner has clearly misconstrued the facts in her favor and for that reason, Defendants/Respondents request this Court's patience in permitting the Respondents the opportunity to set forth those facts that were discovered and known to the trial court at the time he granted summary judgment.

On March 7, 1989, Deputy Craig McDannel and Deputy Shaw were summoned to the home at 311 East Street in Hartford, Michigan by Shari Heffington. Ms. Heffington returned home after a day of visiting and drinking to find the Plaintiff's Decedent angry. He began assaulting her with a 23-24 inch machete. Ms. Heffington perceived Mr. West to be acting crazy, perhaps because of his jealousy or perhaps because of his excessive drinking that day. Ms. Heffington indicated that he had previously assaulted her at the home on several occasions. On one other occasion, a Hartford police officer was summoned after Mr. West had assaulted Ms. Heffington. Ms. Heffington had to save herself by hitting Mr. West in the head with a beer bottle.

On this particular night, Ms. Heffington escorted the Deputies into the house because she was scared, she could not reason with Mr. West, and he was threatening her with a knife. Shortly after the Deputies were escorted into the living room, Mr. West entered the room and continued to advance with a raised machete

toward Ms. Heffington and the two Deputies. The Deputies told him to stop at least three times. When Mr. West failed to heed the Deputies' warnings and continued to advance on them with the machete, Deputy McDannel shot. Mr. West died as a result of the gunshot wound. Ms. Heffington said that Mr. West had walked within 5 feet of them raising the machete as if to swing it when the Deputies shot.

Mr. West was not employed because of disabling arthritis. Ms. Heffington understands that he was taking prescriptions for the arthritis. These prescriptions were not supposed to be mixed with alcohol. When he did mix the prescriptions with alcohol he became mad, crazy, unreasonable. "He ain't got his right mind." Yet, she cannot stay away from him and every time she leaves him, she goes right back to him.

Deposition of Defendant Deputy Craig McDannel

The statement given by Ms. Heffington is substantially similar to the facts testified to by the Defendant Deputy at his deposition. Deputy McDannel testified that Ms. Shari Heffington met them at the doorway. In fact, Ms. Heffington led the Deputies into the house. She informed the Deputies that the man with the knife was still in the house and motioned for the Deputies to come into the home.

Deputy McDannel testified that he did not have time to investigate nor even consider arrest because of the short amount of time that passed between the time they entered and the appearance of Mr. West. The Deputies entered the house because the Complainant invited them in. Ms. Heffington informed the Deputies again that she was being pursued by a man with a knife. The Deputies saw Mr. West come into the living room holding the knife so the lower portion of his arm

was parallel with the floor, or approximately parallel with the floor. The machete was parallel with the floor, but the tip was pointing toward the back. When asked why the Deputies did not retreat, Deputy McDannel responded that he did not have time. Deputy McDannel testified that they did not have any time to do anything else. Mr. West was standing within 4 to 6 feet from Deputy McDannel at the time he shot.

Although Deputy Shaw also drew his weapon, he did not shoot and held the gun at his side. He also stated that the Deputies repeatedly told West to "stop." Deputy McDannel did not shoot until Mr. West continued to come forward with the raised machete.

Answer: "When he began to raise the machete, I raised my arm, my revolver, took aim, and told him to drop it again another time after I had aimed. And when he didn't, that's when I fired.

Question: He never said a word?

Answer: No.

Question: And Shari Heffington, until he gets shot, isn't saying anything or is she?

Answer: She is.

Question: What does she say?

Answer: She is telling him to 'drop it, James.'"

Plaintiff's Decedent was obviously committing a crime in the presence of the Deputies, felonious assault. At no time did Mr. West stop the process of raising his machete as he approached the group until the time the Deputy fired the gun. It did not appear to the Deputy that he was going to stop advancing or release the machete. Deadly force was required for the purpose of protecting the Deputies and Ms. Heffington.

Deputy McDannel testified that he was a certified Deputy who had attended the Michigan Law Enforcement Officer's Training Council Basic Recruit School in 1974. It was sponsored by the State of Michigan. He attended Basic Narcotic School in April, 1975. He attended the Michigan Law Enforcement Officer's Training Council Advance Police Academy. He attended a seminar on interrogations, admissions and confessions. He attended a training for supervisory development.

Deputy McDannel had received a commendation by the Department and by the Optimist Club for work in instituting a program to utilize tracking and narcotics dogs. Deputy McDannel had never been reprimanded. The only other time Deputy McDannel discharged his weapon in the line of duty was to kill a deer that had been hit by a car, but had not died. Contrary to the Plaintiff's Statement of Facts, an investigation by the Michigan State Police Department did occur in regard to this incident.

The Deposition Testimony of Herbert C. Rosema, Sheriff

Sheriff Rosema brought the General Operating Policy and Procedural Manual of the Department to his deposition. The Sheriff's Department does have a procedure for conducting internal investigations. If a Deputy shoots at someone, the manual requires notification from the State Police. The Michigan State Police assist in investigating the Complaint. The manual requires that the Deputies involved make a report which goes into a file. The Sheriff reviews the reports, contacts the prosecutors, and makes a determination in regard to the incident. Although the State Police do the investigation, the report is turned over to the Sheriff or Under-sheriff to determine whether they will take the disciplinary action. Exhibit 17 outlined the written internal investigation procedures. Although Sheriff Rosema did go to the

house on the evening after the shooting, he did not leave his vehicle. He had taught his Deputies that when they are not involved in the investigation, they should not go into the scene or they could contaminate evidence.

With regard to this incident, the prosecutor did conduct an investigation to determine whether or not Deputy McDannel should be charged. The only other incident that he could recall that involved a shooting occurred in 1982-83 where the State Police officers asked for assistance in handing a hostage situation.

The Department is currently experimenting with a procedure of self-evaluation. In that procedure, the individual Deputy would be evaluated and then he would have the opportunity to respond to his evaluation.

Moreover, Sheriff Rosema testified that if, upon investigation, he had concluded that the Deputy had done something wrong to violate a policy, then Deputy McDannel would have been disciplined as a result of the incident. He made the determination of whether discipline was deserving after he returned from his vacation, which lasted approximately 2½ weeks. He concluded that no disciplinary action was warranted after sitting down discussing the matter with the Undersheriff and later, the prosecutor. The Sheriff also reviewed a number of documents. The Sheriff concluded that Deputy McDannel used good judgment.

Plaintiff's counsel was provided with a Complaint number and file class, 180-1212-89. The file contained a standard crime report, UD 104. It included reports made by Mr. Svilpe, Mr. Craft and Sandra Hagg, the dispatcher. It also included a report from Deputy Lux, a report from Lawrence Police Department by Kirk Goodrich, a Michigan Municipal Authority Incident Report, a L.E.I.N.

report on James West, and a booking card on Mr. West. It contained handwritten notes by Deputy McDannel. It contained a Department of State Forensic Division Report. There was a Department of State Laboratory Report from James Bullock. The Standard Crime Report was signed by John Gillespie. It also included a Hartford Police Investigation Report signed by Mr. Gress. The Hartford Department Investigation Report contained the transcript of Shari Heffington. An envelope contained a report on the autopsy by Dr. Glaser. The report from the Michigan State Police was written by Mr. Wallace, which includes the transcripts of his meetings with Mr. Lux, Mr. Craft, and Sari Heffington. The policy manual contained a policy with regard to the use of deadly force. As new employees arrived, they are provided with a copy of the policy book. The new employees review the policy manual with their sergeant. If they have any questions, they contact the Undersheriff or the Sheriff. In addition to the local policies, the mandatory guidelines of the Michigan Law Enforcement Officer's Training Counsels' Rules and Regulations apply to the Deputy. The Officers or Deputies learn about those policies, practices and procedures of that agency through their school certifications program.

SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment to the Defendants in the instant case. Additional discovery would not have uncovered any outcome-determinative fact. Plaintiff had adequate time for discovery and presentation of the evidence discovered to the experts prior to the Motion for Summary Judgment. Therefore, dismissal of the matter was not premature.

The trial court properly granted summary judgment on the substantive matters where the Sheriff's Depart-

ment received an excited, hysterical phone call indicating that a citizen was involved in a life-threatening situation. Upon arrival at the home, the Deputies were escorted into the house by a woman who indicated that her life was being threatened by a resident with a 23-24 inch machete. In the next few moments, the Plaintiff's Decedent entered the room raising the machete and advanced upon this individual and the two Deputies. Notwithstanding the continued request to stop, drop the machete, and please to not advance any further, the assailant continued forward. One of the Deputies shot. One of the Deputy's bullets fatally wounded Plaintiff's Decedent. Respondents asserted, and the trial court properly agreed, that the constitutional rights of the Plaintiff's Decedent were not violated under the facts of the instant case.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT PROPERLY CONCLUDED THAT ADDITIONAL DISCOVERY WAS UNNECESSARY BECAUSE THE PLAINTIFF COULD NOT SUGGEST AN OUTCOME-DETERMINATIVE FACT THAT WOULD HAVE BEEN REVEALED THROUGH ADDITIONAL DISCOVERY, AND SUFFICIENT OPPORTUNITY FOR DISCOVERY HAD OCCURRED.

Fed. R. Civ. P. 56 permits the remedy of summary judgment where there is no genuine issue of material fact. Without a material fact in controversy, the movant is entitled to judgment as a matter of law. *Anderson* v. *Creighton*, 483 U.S. 635; 107 S. Ct. 3034, 3042; 97 L. Ed. 2d 523 (1987). Rule 56 "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . designed to secure the just, speedy and economical determination of every

action." *Celotex Corp.* v. *Catrett*, 477 U.S. 317 at 327; 106 S. Ct. 2548; 91 L. Ed. 2d 265 (1986). There, the Court noted:

> "In our view, the plain language of Rule 56(C) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to summary of judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has a burden of proof." *Celotex Corp*., *supra*, 477 U.S. at 322-323 (1986).

In the instant case, a review of the Statement of Facts as set forth by the Defendants clearly provides that discovery in this matter did occur. The incident occurred on March 7, 1989. The Complaint was filed on August 14, 1989. The summary judgment hearing was heard on November 21, 1989, and the Judge filed his Opinion dismissing the claim on December 13, 1989.

A review of the docket entry sheet and the Defendants/Respondents' Statement of Facts illustrates that a number of depositions were in fact taken in this matter. Plaintiff filed the deposition of Defendant Sheriff Cal Rosema. Plaintiff also filed the deposition of Defendant McDannel and Deputy Shaw, the Deputies involved in the incident. In addition, the Plaintiff has taken the

deposition of other deputies that arrived on the scene, Deputy Craft and Deputy Lux.

A statement by the eyewitness, Ms. Heffington, is very similar to the rendition of the pertinent facts described by the Deputies. Contrary to the Plaintiff's assertion, the trial court did not rely on merely self-serving statements of the Deputies. To the contrary, it is the Plaintiff who relies on bare assertions and unsubstantiated conclusions.

The trial court, in fact, reviewed the evidence presented by the parties, including numerous documents and reports that were filed, in reference to the Defendants' Motion for Summary Judgment. The trial court gave the Plaintiff an opportunity to file a supplemental brief. However, the trial court concluded that the allegations that the Defendant Deputy did not formulate a plan prior to his action did not rise to the level of gross negligence. The court also concluded that as a matter of law the entry into the house where the man was wielding a machete was not "of a magnitude such that it was highly probable that harm would follow." It is not reasonable that a man with a knife would advance on two Deputies with drawn guns. It is undisputed that Plaintiff's Decedent advanced on the Deputies and Ms. Heffington with a 23-24 inch machete raised in the air and that he failed to heed any warnings to stop.

Notwithstanding the Plaintiff's attempt to create a disputed issue of fact, the Plaintiff was unable to provide any support for a genuine material issue of fact that would affect the outcome of this case. At oral argument before the 6th Circuit and in her Brief in Support of her Petition, the Plaintiff asserts that additional expert testimony would have revealed that the Plaintiff's Decedent was not 4-6 feet away from the Deputies and Ms. Heffington, but that the Plaintiff's Decedent was 8-9 feet away

from the Deputies and Ms. Heffington. However, the difference of a few feet does not alter the outcome of this case where the assailant is advancing on Ms. Heffington and the Deputies, ignoring their requests to stop, extending a 23-24 inch machete in an attack position. Therefore, the Petitioner's assertion that sufficient opportunity for discovery did not occur is completely without merit. Petitioner has failed to support any facts that would contradict the outcome-determinative facts in this case.

As noted by the 6th Circuit Court of Appeals' Opinion:

> "The District Court has broad discretion in regulating discovery, and its ruling will not be overturned unless there is a clear abuse of discretion. *Misco, Inc.* v. *United States Steel Corp.*, 784 F.2d 198 (6th Cir. 1986); see also *Little* v. *City of Seattle*, 863 F.2d 681 (9th Cir. 1988)." (Opinion, pg. 3).

The trial court did not abuse this discretion in not permitting Plaintiff's counsel additional time. The trial court judge did give Plaintiff's counsel an opportunity to file a Supplemental Brief. Plaintiff was unable to produce any factual support for his position or present sufficient justification to extend discovery. Based upon the materials and arguments the Plaintiff presented, the trial court properly concluded that further discovery was not warranted.

II.

THE DEPUTIES' ENTRANCE WITH IMPLICIT CONSENT AND UNDER EXIGENT CIRCUMSTANCES INTO THE HOME WAS PERMISSIBLE WHERE THEY WERE ESCORTED IN BY THE COMPLAINANT, WHO HAD INDICATED SHE WAS BEING CHASED BY A MACHETE-WIELDING ASSAILANT.

A. Van Buren County Sheriff's Department Is Not A Separate Entity Subject To Liability.

It is well established that the Sheriff's Department is not a legal entity which may be sued in its own name. *Mooney* v. *City of Holland*, 490 F. Supp. 188 (W.D. Mich. 1980); *Davis* v. *Chrysler Corp.*, 151 Mich. App. 463; 391 N.W.2d 376 (1986), citing *McPherson* v. *Fitzpatrick*, 63 Mich. App. 461, 464; 234 N.W.2d 566 (1975). Therefore, the claims against the Van Buren Sheriff's Department must fail and the Sheriff's Department is not a proper party to this lawsuit under any theory of recovery. *Portice* v. *Otsego Co.*, 169 Mich. App. 563; 426 N.W.2d 706 (1988); *lv. den.* 431 Mich. 895 (1988).

B. The Deputies' Entrance Into The Home Is Permissible Where They Were Escorted In By The Complainant Who Indicated She was Being Chased By A Machete-Wielding Assailant.

Defendants agree with the trial court's conclusion that the entry into the home was proper. Defendants assert that a warrantless search for purposes of exploratory investigation and the furtherance of a prosecution of a criminal action is not at issue in the instant case.[1] In the instant case, the Deputies were not on the premises to effectuate an arrest, but were summoned on an emergency basis to aid an individual in a life-threatening situation.

---

[1] For purposes of analysis, it should be noted that the instant case is a civil matter pursuant to 42 U.S.C. 1983 and a request for damages. To the contrary, this matter does not involve criminal proceedings and the determination of whether the proffered evidence would be excluded from the criminal proceedings as a result of the violation of the search and seizure rule. Improperly procured evidence for purposes of criminal matters is carefully scrutinized, but the proposition that the allegedly illegally-obtained evidence is excluded does not automatically provide the Plaintiff with the corresponding right to damages on that matter. *Bowens* v. *Kanzze*, 237 F. Supp. 826 (E.D. Ill. 1965); *aff'd.* 318 F.2d 828 (7th Cir. 1965).

The courts have held that police, in the exercise of their duties as police officers, have a right to enter and investigate in an emergency without an accompanying intent to either search or arrest. *Barone* v. *United States*, 330 F.2d 543 (3rd Cir. N.Y. 1964); *cert. den.* 84 S. Ct. 1940; 377 U.S. 1004; 12 L. Ed. 2d 1053 (1964). Officers are not required to delay the course of an investigation if failure to do so would gravely endanger their lives or lives of others. *United States* v. *DeBose*, 410 F.2d 1273 (6th Cir. 1969).

> "First, the party asserting his Fourth Amendment right must establish that a search or seizure occurred of his person, house, papers or affects, and that said search was conducted by an agent of the government; stated differently, there must be an invasion of the claimant's reasonable expectation of privacy. *Katz* v. *United States*, 389 U.S. 347, 388 S. Ct. 507; 19 L. Ed. 2d 576 (1967); *United States* v. *Vachaner*, 706 F.2d 1121 (11th Cir. 1983). Second, the claimant must establish that the challenged search and seizure was 'unreasonable,' because all searches and seizures are not prescribed by the Fourth Amendment. *Elkins* v. *United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 1446; 4 L. Ed. 2d 1669 (1960)."

Both of the aforementioned requirements are separate and distinct, and both must be met before violation of an individual's rights guaranteed by the Fourth Amendment can occur. *Rawlings* v. *Kentucky*, 448 U.S. 98, 112; 100 S. Ct. 2556, 2565; 65 L. Ed. 2d 633 (1980).

In *Ball* v. *State of Georgia*, 733 F.2d 1557 (11th Cir. 1984), the Court concluded that trespass was not a Fourth Amendment constitutional violation. In *Ball*, plaintiff became angry with his daughter and his friends, which resulted in the vandalizing of a

neighbor's bicycle. The parents of the neighbor child called the police, who went to the Ball residence. Officer Putnam remained on the porch, although he was invited into the house by Ball. The officer requested the full name of Mr. Ball, but Mr. Ball indicated he was going to call his lawyer when in fact he found a 6-inch blue steel revolver which he pointed at the officer as he stood behind the door at the top of the stairs. A shooting resulted.

There, the Court assumed for purposes of argument only that a search and seizure had occurred, but concluded that the challenged search was not unreasonable since Ball implicitly consented to the presence of the officer on his property. To determine the reasonableness of a practice, the Court weighed the public interest promoted by the practice versus the personal rights of the individual protected by the Fourth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 588; 99 S. Ct. 1861, 1884; 60 L. Ed. 2d 447, 481 (1979). Consideration of the following factors is relevant.

1) The scope of the particular intrusion;

2) The manner in which it is conducted;

3) The justification for initiating it; and

4) The place in which it is conducted. *Bell*, *supra*, 441 U.S. at 559; 99 S. Ct. at 1884.

The Appellate Court properly concluded that Ms. Heffington did have apparent authority to permit entry into the house, relying on *United States* v. *Matlock*, 415 U.S. 164; 94 S. Ct. 98; 39 L. Ed. 2d 242 (1974), to distinguish this case from *Moffett* v. *Wainwright*, 512 F.2d 496 (5th Cir. 1975). The Appellate Court also acknowledged that search of a private residence without a warrant is permissible if it is in response to an emergency. *United States* v. *DNT*, 747 F.2d 263, 267 (4th Cir. 1984). Likewise,

in *Jones* v. *Lewis*, 875 F.2d 1125 (6th Cir. 1989), the Court affirmed the proposition that a liability could not attach if the warrantless entry was precipitated by exigent circumstances, i.e., that the suspect represented an immediate threat to the arresting officer or public.

Recently, this Court acknowledged that officers may search a house after the officers have found the items or persons listed on the warrant in order to insure their safety while making the arrest. The interest of the officers' safety outweighs the intrusion. *Maryland* v. *Buie*, 494 U.S. 325; 108 L. Ed. 2d 276; 110 S. Ct. 1093; 58 U.S.L.W. 4281 (1990).

In *United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984), the Appellate Court recognized the validity of a warrantless entry where there is an urgent need for immediate action, a compelling reason to justify the lack of a warrant and a serious, demonstrable potential for danger.

In *Butler* v. *City of Detroit*, 149 Mich. App. 708; 386 N.W.2d 645 (1986), the police were called to a party at a residence. The live-in girlfriend called the emergency number and requested assistance at the address when the son and the father became involved in a fight. The officers were escorted into the apartment by the girlfriend. Thereafter, the decedent advanced toward the officers holding a knife in a threatening manner. The officers shot and killed Dink Butler. The Court concluded that the officer was entitled to governmental immunity under the state claims, but also concluded that the plaintiff failed to state a 42 U.S.C. 1983 claim under the Eighth or Fourteenth Amendment. The Court recognized in that case that a Fourth Amendment claim was neither pled nor tried, but reversed the 1983 damages against the Defendant. 386 N.W.2d at 651-652.

In the instant case, the police were called to the residence. When they arrived, Ms. Heffington was in the house, opened the door, and escorted the Deputies into the house. Ms. Heffington's statement implied that she and Mr. West have had a relationship for a long period of time which she has been unable to terminate notwithstanding his abuse.

Additionally, the Deputies were not entering the home for purposes of searching out evidence to seize for criminal prosecution. The Deputies were called there to respond to the life-threatening situation and were summoned by a hysterical phone call. Pursuant to M.C.L.A. 764.15a; M.S.A. 28.874(1), "a police officer who has reasonable cause to believe that a violation [citations omitted] . . . has taken place or is taking place and that the person who committed or is committing the violation is a spouse, a former spouse, or a person residing or having resided in the same household as the victim, may arrest the violator without a warrant for that violation, irrespective of whether the violation was committed in the presence of the peace officer."

Moreover, contrary to the Plaintiff's argument, hearsay from named persons who supply detailed information with direct knowledge of the fact is admissible for determining probable cause for a search warrant. *United States* v. *Jensen*, 432 F.2d 861 (6th Cir. 1970). Therefore, these Deputies had a reasonable belief that they had the consent to enter to perform their duty, and their entry was required where exigent circumstances included danger to the lives of others. These facts were known before the Deputies arrived at the scene. The Deputies were informed that a grave offense may be taking place; the suspect was reasonably believed to be armed; the emergency call provided a clear showing of probable cause; and the Deputies had

a strong reason to believe the suspect was in the dwelling. A peaceable entry was permitted at a reasonable time. These considerations support the position that the entry into the home was lawful.

Petitioner, however, asserts that the victim, Shari Heffington, did not have authority to admit an outsider into the dwelling, thereby implying that if they had inquired and she indicated she was just visiting, that the Deputies should turn around and leave the area. Respondents submit that it is that type of reasoning which resulted in the trial court's characterization of the Plaintiff's argument as "absurd." The Deputies had the obligation to maintain peace. Mr. West had no right to use deadly force against Ms. Heffington or the Deputies.

Moreover, Plaintiff continually concludes that the alleged unlawful entry into the home is the cause of the injury. However, assuming for purposes of argument that the entry was unlawful, the injury was not a direct cause of that activity. The injury was a direct cause of Mr. West's continued advancement upon the victim and the Deputies in a threatening manner with a large machete. Plaintiff fails to cite any authority to support the principle that Mr. West had the right to attack or threaten anyone in his house with a machete. No one threatened Mr. West until he advanced and ignored their continued requests to halt.

Moreover, the fact that the third party, Shari Heffington, invited the Deputies into the home entirely supports the defense of consent. It is undisputed that Ms. Heffington asked and escorted the Deputies into the home because she was frightened because she was being chased by a wild, crazed man with a knife. The courts have concluded that a consent to the search of a room was binding on the Defendant where the two

people were co-inhabitants. *United States* v. *Matlock*, 415 U.S. 164, 171; 94 S. Ct. 98; 39 L. Ed. 2d 242 (1974).

Ms. Heffington had apparent authority to permit the Deputies' entry into the house. Where Deputies are called to a home and escorted into a home under such circumstances, the trial court was correct to conclude that the entry was reasonable and, further, that it was unnecessary for the Deputies to ask for titlework or lease papers. In the instant case, the Deputies were not given the opportunity to investigate, but were required to respond immediately to a life-threatening situation.

Plaintiff has been unable to support any allegations or conclusions to the contrary. Plaintiff has not substantiated his position that Ms. Heffington did not have a right to be in that house or had no right to escort the Deputies into the house. Plaintiff failed to establish who, in fact, did have ownership interest, etc. Ms. Heffington escorted the Deputies into the home and Mr. West did not indicate otherwise.

Such evidence is irrelevant to the issue at hand. There was no "search" for purposes of criminal investigation. Plaintiff relies on case law which concludes that evidence obtained under improper circumstances would be inadmissible to support a criminal conviction. If it is later determined that evidence is excludable, such a determination for a criminal proceeding does not automatically give rise to a constitutional violation for civil damages. Plaintiff, even assuming for purposes of argument that a search had occurred, failed to support evidence that would permit the Plaintiff to meet the requisite standard for establishing her claim.

Ms. Heffington contacted the police and invited them into the house. She had apparent authority to be in the house and by her own admission had resided there and

had on other occasions contacted the police from that address because of Mr. West's abuse of her. There, even assuming for purposes of argument a "search" under the Fourth Amendment could have occurred rather than a mere trespass, at best, the Deputies were rightfully in the room by her consent. See also *Tope* v. *Howe*, 179 Mich. App. 91; 445 N.W.2d 452 (1989); *People* v. *Gray*, 150 Mich. App. 446; 387 N.W.2d 887 (1986).

Moreover, the Plaintiff's argument that the individual, Mr. West, had the right to come after the Deputies with deadly force is absurd. There is absolutely no evidence by the testimony of either Ms. Heffington or the Deputies that Mr. West had requested that the Deputies leave, even assuming for purposes of argument that the Deputies had sufficient time to question or leave. The evidence unequivocally established that their guns were not drawn until after Mr. West advanced toward them. Mr. West had no justification for advancing upon these people with a raised machete, even if they were all trespassers.

As acknowledged by the Petitioner in her Brief, exigent circumstances do arise "where officers have a justifiable belief that felony is being committed," *United States* v. *Mark Polus*, 516 F.2d 1290 (1st Cir. 1975); *cert. den.* 423 U.S. 895; 46 L. Ed. 2d 127; 96 S. Ct. 195 (1975). Here, it is undisputed that the Deputies received a call indicating that Ms. Heffington was fearing for her life because she was being pursued by a man with a knife. Moreover, the description of the circumstances was verified when the Deputies arrived, and later, when Mr. West walked into the room with a machete and proceeded to raise the machete as he approached the three individuals, ignoring any warnings to stop his actions. Exigent circumstances exist where there is a real danger to the police or the public. *United States* v. *Bulman*, 667 F.2d 1374, 1383-1384 (11th Cir. 1982).

Under the facts of this case, objective, reasonable minds could not disagree that the Deputies, informed of a dangerous circumstance, acted reasonably under the circumstances. Plaintiff's claims constitute a second-guessing of the Deputies' handling of the situation, asserting alternatives in hindsight which, in essence, amount to an attempted claim for negligence, at best, but fall short of a constitutional violation. *Jones* v. *Sherill*, 827 F.2d 1102, 1106 (6th Cir. 1982); *Nishiyama* v. *Dickson Co., Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987). Therefore, as the trial court correctly concluded, the Plaintiff's assertion that the entry was improper was insufficient to rise to the level of a constitutional violation and was without merit.

C. Alternatively, The Individual Deputies Are Entitled To Qualified Immunity For Any Acts Of Alleged Illegal Search And Seizure.

Police officers, and other executive officials, are granted "qualified immunity." At one time, this immunity required that an officer show a lack of personal malice toward the plaintiff and objectively-reasonable belief that his actions were legal. However, the landmark case of *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 395 (1982), changed the nature of this defense. The sole inquiry is now whether the defendant knew or should have known that he was violating the plaintiff's clearly-established rights.

> ". . . we therefore hold that governmental officials performing discretionary functions generally are shielded from liability for civil damages unless their conduct . . . violates clearly established statutory or constitutional principles of which a reasonable person would have known."

Plaintiff has not and cannot present any evidence that the Defendant acted in bad faith when he shot Plaintiff's

Decedent. This proof is essential to hold a government official or agent liable for damages arising out of a violation of constitutional rights.

Rheaume v. *Texas Department of Public Safety*, 666 F.2d 925 (5th Cir. 1982), states:

> "Once an official has shown that he was acting in his official capacity and within his scope of authority, the burden shifts to the plaintiff to breach the official's immunity by showing that the officer lacked good faith."

In *Rheaume*, the plaintiff was incarcerated for traffic violations. Plaintiff claimed the arrest was false and thus, a violation of his constitutional rights. The Court held that the defending officer was clearly acting within the scope of his authority. Since plaintiff did not present any evidence that defendant lacked good faith, defendant's actions were protected by qualified immunity.

Whether qualified immunity applies is purely a question of law for the District Court. *Dominique* v. *Telb*, 831 F.2d 673, 677 (6th Cir. 1987). In *Vizbaras* v. *Prieber*, 761 F.2d 1013 (4th Cir. 1985); *cert. den.* 474 U.S. 1101; 106 S. Ct. 8803; 88 L. Ed. 2d 918 (1986), the Court held that in deciding whether defendants used reasonable force to subdue an arrestee who died of asphyxiation as a result of "cradle cup," wherein his legs were at 45-degree angles to the floor in shackles, an honest belief that the procedure was necessary was relevant to "qualified immunity."

In *Whitt* v. *Smith*, 832 F.2d 451 (7th Cir. 1987), an officer who did not speak with the victim or witnesses to a shooting incident, but recalled a similar event involving a plaintiff who lived nearby, entered the plaintiff's home, saw him with a shotgun, and wounded him. There, a denial of "qualified immunity" was reversed

and remanded because of the inadequacy of findings by the District Court. The immunity inquiry is separate from the Fourth Amendment issues.

In *Clark* v. *Evans*, 848 F.2d 876 (11th Cir. 1988), a dangerous escaping prisoner was killed after scaling an outer fence. The "information available" to the guard that shot him could lead the guard to believe that another officer was not in the position to subdue the decedent. This principle has been expressed in *Anderson* v. *Creighton*, 483 U.S. 635, *supra*, as being, if the officers' conduct could reasonably have been thought to be consistent with the rights they allegedly violated, they would be entitled to qualified immunity. The Court should not use hindsight judgment as its test to determine what force was necessary. (*Id.*)

In the instant case, the undisputed facts show that Defendant Deputy McDannel feared for his own life and the lives of others. This fear was reasonable under the circumstances where Mr. West continued to advance them, brandishing an upraised machete and ignoring the warnings to stop. The Deputy's use of deadly force was justified. Deputy McDannel's conduct was also consistent with the Van Buren Sheriff's Department policy and regulations providing for the use of deadly force. Compliance with these regulations is further evidence of McDannel's good faith. The undisputed, objective, material facts support the conclusion that Deputy McDannel could only reasonably believe that he was *not* violating Plaintiff's clearly-established rights but, rather, that he was justifiably acting in defense of himself and others.

D. The Sheriff Is Not Responsible For Acts Of His Deputy Under Respondeat Superior Liability.

The common law doctrine of "respondeat superior" holds the employer liable for torts committed by ser-

vants or employees if they occur within the scope of the employee's duties. Historically, municipal and county employers of police were not held liable on this theory for two reasons. First, vicarious liability would invade the realm of sovereign immunity established by the courts. Second, police officers were not even regarded as employees of the entity which paid them because they were sworn to uphold the law and were agents of the law itself.

Indeed, since respondeat superior liability, even if applicable, only held an employer liable, superior officers were not responsible for the acts of subordinate personnel since they were fellow officers and not employers of their subordinates. *Wilkins* v. *Whitaker*, 714 F.2d 4 (4th Cir. 1983); *cert. den.* 468 U.S. 1217; 104 S. Ct. 3586; 82 L. Ed. 2d 884 (1984). There, a police chief was not liable for a detective's allegedly wrongful search in taking a plaintiff's property. In *Kelly* v. *Ogilivie*, 35 Ill. 2d 297; 220 N.E.2d 174 (1966), the respondeat superior theory was not available to plaintiff in an action against a jail warden and sheriff for the torts of subordinates. In *Isereau* v. *Stone*, 3 A.2d 243; 160 N.Y.S.2d 336; 3 A.2d 243 (1947), the sheriff was not liable for the torts of a sheriff's deputy. "The fact that [the sheriff] may have acted through his deputies does not change the situation, for of necessity he must act through them in most instances, for he and they are considered one in the same officer."

In Michigan, no sheriff is responsible for the acts of misconduct in office of any deputy sheriff. M.C.L. 51.70; M.S.A. 5.863 specifically states:

> "Each sheriff may appoint 1 or more deputy sheriffs at his pleasure, and may revoke such appointments at any time; and persons may also be deputed by any sheriff, by an instrument in

> writing, to do particular acts, who shall be known as special deputies and each sheriff may revoke such appointments at any time. No sheriff shall be responsible for the acts, defaults and misconduct in office of any deputy sheriff . . ."

See also *Portice*, *supra* at 708, citing *Bayer* v. *Macomb Co. Sheriff*, 29 Mich. App. 171, 174; 185 N.W.2d 40 (1970). Under the authorities stated above, it is clear that the trial court properly granted summary judgment to the Sheriff and the Sheriff's Department in this case. *Portice*, *supra*.

Moreover, a claim for supervisory liability under 42 U.S.C. 1983 does not lie where that individual did not actively participate in the incident and there is no connection between the alleged violation and the individual Defendant. *Jones* v. *Lewis*, *supra*; see also *Spear* v. *Lee*, 728 F. Supp. 1408 (E. D. Mich. 1989).

Therefore, the trial court properly granted summary judgment of these issues.[2]

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[2] Although it is unclear as to which specific Defendants the Petition includes, it is abundantly clear that the claims of inadequate training as to either the entity or the Sheriff have been abandoned. Notwithstanding, there is no policy of inadequate training in the instant case as clearly established by Sheriff Cal Rosema's deposition testimony. *Monell* v. *Department of Social Services*, 436 U.S. 658; 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978). Secondly, as to the individual, Sheriff Cal Rosema, the decision in *Hayes* v. *Jefferson County, Kentucky*, 668 F.2d 869 (6th Cir. 1982); *reh. den.* 673 F.2d 152 (6th Cir. 1982); *cert. den.* 459 U.S. 833; 103 S. Ct. 75; 74 L. Ed. 2d 73 (1982) is controlling. It held that a supervisory official of a municipality cannot be liable for failure to train unless there is a complete failure to train such that future police misconduct is almost inevitable or substantially certain to result in a constitutional violation. Clearly, Officer Rosema established in the instant case that the Deputies were trained. Therefore, assuming for purposes of argument only that the Plaintiff has not in fact abandoned these claims, Defendants argue that such claims are totally without merit. See also *Languirand* v. *Hayden*, 717 F.2d 220, 227-228 (C.A. 5, 1983).

III.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS ON THE ISSUE OF EXCESSIVE FORCE WHERE REASONABLE MINDS COULD ONLY CONCLUDE THAT THE DEPUTIES WERE ACTING TO PROTECT A CITIZEN AND IN SELF DEFENSE WHEN CONFRONTED BY THE PLAINTIFF'S DECEDENT, WHO WAS ATTACKING WITH A 23-24 INCH MACHETE WHILE IGNORING ANY REQUEST TO HALT.

Defendants incorporate by reference those arguments in the preceding argument relating to the availability of qualified immunity for the individuals, the lack of a policy as to the municipal liability, *Monell, supra*, the lack of respondeat superior liability of the Sheriff, and the lack of an independent status for purposes of bringing an action against the Sheriff's Department, into this argument. Those same arguments apply in the instant case, but to avoid redundancy Defendants rely upon adoption of those same arguments and authorities herein. The trial court properly concluded that the Deputies' actions in the instant case were reasonable as a matter of law. Plaintiff could not provide any support for any substantive evidence that would affect the outcome of this case in regards to those actions taken by the Deputy in response to an unyielding assailant attacking with a 23-24 inch machete.

The United States Supreme Court has set forth the standard for the use of deadly force in the case of *Tennessee v. Garner*, 471 U.S. 1; 105 S. Ct. 1694; 84 L. Ed. 2d 1 (1985). Deadly force can be used only "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." The Court amplified on the rule in the following terms:

> "If the suspect threatens the officers with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Tennessee* v. *Garner*, 105 S. Ct. at 1701.

It has been alleged that Defendant Deputy McDannel used excessive and deadly force in violation of the Fourth Amendment's prohibition against unreasonable seizure of the person. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard. See *Tennessee* v. *Garner*, *supra*; *Graham* v. *Connor*, 490 U.S. 386; 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989).

> "Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest by flight."
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> * * *
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> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with a 20-20 vision of hindsight." (citation omitted).
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> * * *
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> "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive

> force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott* v. *United States*, 436 U.S. 128, 137-139 (1978), see also *Terry* v. *Ohio*, 392 U.S. 1, 21." *Graham* v. *Connor*, *supra*, 57 Law Week 4513, 4516 (1989).

In a case quite similar to the instant case, the United States District Court in Maryland held that the officer's use of deadly force to protect himself was entirely justified. *Estate of Belew* v. *Ruppert, Jr.*, 694 F. Supp. 1214 (D.C. Md. 1988). In that case, after attempting to arouse the decedent from a drunken stupor in a parking lot, the decedent struggled with the deputy and disarmed him of his night stick. Once he had the night stick, decedent raised it over his head and relentlessly advanced on the deputy with the stick upraised in the threatening position, ignoring the deputy's repeated orders to "STOP." The deputy expressly warned the decedent several times that if he did not stop, he would be shot. Nonetheless, the decedent continued advancing on the deputy until the deputy shot and killed him. The Court noted that these facts were undisputed in the depositions, determined that the deputy's use of deadly force to protect himself was entirely justified, and granted summary judgment to the defendant under Fed. R. Civ. P. 56(C). See also *Butler*, *supra*.

The traditional right to use the same amount of force permissible in self defense to protect third persons is, of course, applicable to police officers, who have the authority (if not the duty) to protect the public at large. *Sandman* v. *Hagan*, 261 Iowa 560; 154 N.W.2d 113 (1967). See also *Personal Injury: Actions, Defenses, Damages*, "Assault and Battery" (Mathew Bender 1976); Prosser

and Keeton, *Torts* (5th Ed. 1984), pp. 129-130; and *Police Civil Liability*, "Duty to Protect" (Mathew Bender 1989); *Pleasant* v. *Zamieski*, 895 F. 2d 272 (6th Cir. 1990); *Newcomb* v. *Troy*, 719 F. Supp. 1408 (E.D. Mich. 1989). (Officer's actions in shooting a burglary suspect were justified because he was perceived as an immediate threat to the public, where the suspect was running toward a store clerk whom he had previously held as a hostage.)

The undisputed, material facts in this case show that while Deputy McDannel was answering the call concerning an assailant with a knife, Plaintiff's Decedent began to approach him and two others holding a 23-24 inch machete in a threatening manner. Although told to stop and drop the weapon numerous times by Deputy McDannel and the others, Plaintiff's Decedent made no response to these requests and continued to advance without a change in facial expression. His eyes were fixed upon Shari Heffington, who stood immediately to the left of Deputy McDannel. In the belief that Plaintiff's Decedent was going to use the machete, Deputy McDannel drew his gun. When Plaintiff's Decedent was no more than five to six feet from the three of them, Deputy McDannel raised his weapon and pointed it at Plaintiff's Decedent. He told him one final time to drop the weapon. The machete continued to ascend and when Plaintiff's Decedent was between four and six feet away, Deputy McDannel fired his revolver, fatally wounding the assailant.

Thus, the undisputed facts show, as a matter of law, that Defendant Deputy McDannel was justified in his use of deadly force against Plaintiff's Decedent, Mr. West. Police assistance was requested because of West's threatening use of the machete. Now at the scene, Mr. West was advancing upon Ms. Heffington and Deputies McDannel and Shaw, with an upraised machete, a

weapon capable of inflicting serious injury or even death. Under all the circumstances, the Deputy reasonably could, and did, fear for his life, and his use of deadly force to protect himself and others was legally justified.

The Petitioner, however, attempts to discredit the Deputies' credibility, attempting to use this alleged discrepancy as a stepping stone to create a genuine material issue of fact. Respondents first assert that Plaintiff is attempting to improperly stack an improper inference based upon an inference.[3] The Criminologist's affidavit provided by the Petitioner *does* not dispute or contradict the fact of a continued attack on the Deputies and Ms. Heffington in complete disregard for their warnings to stop. The facts as set forth in the affidavit do not controvert Ms. Heffington's or the Deputies' statements that the assailant was advancing on the individuals with a raised machete with a 23-24 inch blade in order to inflict immediate, serious bodily harm. (R.41, Opinion of the Court, p. 7).

CONCLUSION

Respondents assert that the trial court properly granted summary judgment in this matter. Respondents respectfully submit that the 6th Circuit Court of Appeals properly affirmed the granting of summary judgment to the Defendants in this matter. Notwithstanding the Petitioner's bare assertions to the contrary, the discovery conducted provided that the individual Deputies' actions were clearly reasonable and within the constitutional parameters outlined by this Court in previous decisions. The unfortunate death of

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[1] *Ford* v. *Nicol*, 261 Mich. 307, 310; 246 N.W. 130 (1933).

Plaintiff's Decedent was the result of the Plaintiff's Decedent's own voluntary and intentional act to attack the two deputies and Ms. Heffington.

RELIEF REQUESTED

Based upon the foregoing, the Respondents, Craig McDannel, Cal Rosema, Van Buren County Sheriff's Department and Van Buren County, respectfully pray that this Court deny the Petitioner's Petition for Writ of Certiorari, or alternatively, if the Court grant the Petition, that this Court enter an order affirming the trial court's Order Granting Summary Judgment and the 6th Circuit Court of Appeals' decision affirming the trial court's Order Granting Summary Judgment.

Respectfully submitted,

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